TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 196.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

JOHN H. WALRATH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED FEBRUARY 26, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 196.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

INDEX.

	Original.	Print.
Caption	1	1
Order to docket cause	2	1
Transcript from circuit court of Milwaukee county	2	1
Summons	3	2
Complaint	3	2
Notice of trial, January term, 1881	6	3
October term, 1880	7	4
Answer	8	4
Jury	9	5
Affidavit of Jas. G. Jenkins	9	5
Amended answer	11	6
Charge to jury	22	10
Motion for new trial	23	10
Stipulation as to taxation of costs	24	11
Judgment	24	11
Bill of costs	26	12
Undertaking on appeal	26	12
Notice of appeal	28	14
Certificate of clerk	29	14
Bill of exceptions	30	15
Testimony of John H. Walrath	30	15
Affidavit of Jas G. Jenkins	43	23

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
"Exhibit A"—Contract between J. H. Walrath and The Phœnix Mutual Life Insurance Co., Nov. 15, 1865	46	25
B"—Bond of J. H. Walrath to The Phœnix Mutual Life Insurance Co., Nov. 7, 1865	48	26
C"—Letter of Geo. S. Miller, superintendent of agencies, &c., to J. H. Walrath, June 16, 1880	49	27
D"—Amended answer	50	27
Certificate of clerk	57	31
Remittitur from supreme court of Wisconsin	58	32
Notice of trial, May term, 188?	59	33
Order to show cause as to filing amended answer	60	33
Motion for bill of particulars	61	33
Order to show cause as to bill of particulars, &c.	67	36
Affidavit of J. H. Walrath	68	36
Order denying motion for bill of particulars	73	38
Exceptions to order denying motion for bill of particulars	74	39
Petition for removal	75	39
Bond for removal	77	40
Order for removal	80	41
Docket entries	81	42
Clerk's certificate	93	46
Motion to remand	94	47
Affidavit of James G. Jenkins	96	48
Hearing on motion to remand	99	49
Order remanding cause	100	49
Bond	101	50
Order for writ of error, &c.	104	51
Assignment of errors	104	51
Opinion	107	52
Clerk's certificate	115	55
Writ of error	116	55
Citation and service	117	56

1 Circuit Court of the United States for the Eastern District of Wisconsin.

UNITED STATES OF AMERICA, *Eastern District of Wisconsin,* } ss:

At a stated term of the circuit court of the United States of America, for the eastern district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district, on the first Monday (being the first day) of January, A. D. 1883—present and presiding the Honorable Charles E. Dyer, district judge, and also present Henry Fink, marshal, and Edward Kurtz, clerk—among other the following proceedings were had, to wit:

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
vs.
JOHN H. WALRATH,
} At Law.

Be it remembered that heretofore, to wit, at a stated term of said court begun and held according to law, at the city of Milwaukee, on the first Monday (being the second day) of October, A. D. 1882—present, the Honorable Charles E. Dyer, district judge, presiding, and on the first day thereof, to wit, on the second (2nd)
2 day of October, A. D. 1882—the following proceedings were had, to wit:

Order Docketing Case on Removal.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
vs.
JOHN H. WALRATH,
} At Law.

This day came the plaintiff, by its counsel Messrs. Finches, Lynde & Miller, and presented to the court copies of the docket entries and proceedings, together with the original process, pleadings, testimony, and other papers in this cause, certified from the circuit court for Milwaukee county, in this district, pursuant to an order of said court, removing the cause to this court, including the original petition of said plaintiff for such removal, the bond required by law therefor, and the said order of removal. Whereupon it is orderd by the court, that the said papers be filed and that the cause be entered on the law docket of this court, and be proceeded with in the same manner as if it had been commenced here by original process, which certified copies are as follows, to wit:

Certified Copies from State Court.

Circuit Court, Milwaukee County.

3 THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plaintiff,
vs.
JOHN H. WALRATH, Defendant.

The State of Wisconsin to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint.

FINCHES, LYNDE & MILLER,
Plaintiff's Attorneys.

P. O. address: Milwaukee, Milwaukee county, Wis.

MILWAUKEE COUNTY, *ss:*

I certify that at the city and county of Milwaukee, on the 19th day of July, A. D. 1880, I served the within summons on the within named defendant John H. Walrath, personally, by delivering to and leaving with him a true copy thereof.

PETER VAN VECHTEN, JR., *Sheriff.*

Fees $1.40.

(Endorsed:) Filed Jul. 19, 1880. Julius Wechselberg, clerk.

Complaint.

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
against
JOHN H. WALRATH.

4 The complaint of the above named plaintiff, by Finches, Lynde & Miller, its attorneys, respectfully shows and alleges that at and prior to the commencement of this suit, it, the said plaintiff, was a corporation duly created and organised under the laws of the State of Connecticut, to issue life insurance policies and to receive premiums therefor.

And said plaintiff alleges that, prior to the time of the grievances hereinafter alleged, the said plaintiff had in all respects complied with the laws of the State of Wisconsin and Michigan, and was authorized and permitted to issue life insurance policies in said States of Wisconsin and Michigan.

And said plaintiff alleges that in and during the year 1880, and prior to the commencement of this suit, and for many years prior to the year 1880, the said defendant had been and was the duly-autho-

rized agent of the said plaintiff, among other things to collect, receive, and transmit to the office of the plaintiff at Hartford, Connecticut, premiums of insurance on policies of life insurance, issued by said plaintiff to persons and parties who had obtained life insurance
5 policies of said plaintiff, in the said States of Michigan and Wisconsin.

And said plaintiff alleges that said defendant, as the said authorized agent of said plaintiff, and for and on behalf of said plaintiff did, in the year 1880 and prior to the commencement of this suit, collect and receive for said plaintiff premiums on insurance policies issued by said plaintiff on the lives of persons and parties in the said States of Michigan and Wisconsin, to a large amount, to wit, to the amount of ten thousand dollars, and which said sum of money was the property of said plaintiff, and justly due from said defendant to said plaintiff.

And said plaintiff alleges that said defendant has wrongfully taken and converted to his own use said money thus collected by him as such agent for said plaintiff, and for said plaintiff.

And said plaintiff alleges that prior to the commencement of this suit, it demanded of and from the said defendant the said sum of money thus wrongfully taken and converted to his own use, and that said defendant refuses to deliver the said sum of money or any part thereof to said plaintiff, and still refuses to deliver said
6 sum of money or any part thereof to said plaintiff, but wrongfully and unjustly withholds the same from the plaintiff, to the great damage of the said plaintiff, to wit, in the said sum of ten thousand dollars, with interest thereon from the 14th day of July, 1880.

Wherefore said plaintiff demands judgment against said defendant for the wrongful conversion of said sum of money, to wit, the said sum of ten thousand dollars, and interest on said sum at the rate of seven per centum per annum, from the said 14th day of July, 1880, and the costs of this action.

FINCHES, LYNDE & MILLER,
Plaintiff's Att'ys.

(Endorsed:) Service of the within complaint admitted this 7 day of August, 1880. Jenkins, Elliott & Winkler, def'ts att'ys. Filed Aug. 7, 1880. Julius Wechselberg, clerk.

Notice of Trial for Jan. Term, 1881.

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plaintiff,

vs.

JOHN H. WALRATH, Defendant.

Please take notice that the above-entitled action will be brought to trial, and an inquest taken therein, at the January term of

the aforesaid court, to be held at the court-house in the *Milwaukee* [city] of Milwaukee, in the said county of Milwaukee, on the 2d Monday of January, next, at the opening of court on that day or as soon thereafter as counsel can be heard.

Dec. 28, 1880.

Yours, &c.,

FINCHES, LYNDE & MILLER,
Pl'ff's Att'ys.

To Jenkins, Elliott & Winkler, Att'y- for Def't.

Service of a copy of above notice admitted, this 28th day of Dec., 1880.

JENKINS, ELLIOTT & WINKLER,
Att'y- for Def't.

[Endorsed:] Note of issue in the above-entitled cause. Finches, Lynde & Miller, pl'ff's att'ys. Jenkins, Elliott & Winkler, def't's att'ys. Issue of fact for jury. Joined August 26, 1880. Filed by pl'ff's attorney Dec. 30, 1880. Julius Wechselberg, clerk.

Notice of Trial for Oct. Term, 1880.

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plaintiff,

vs.

JOHN H. WALRATH, Defendant.

Please take notice that the above-entitled action will be brought to trial and an inquest taken therein, at the October term of the aforesaid court, to be held at the court-house in the city of Milwaukee, in the said county of Milwaukee, on the first Monday of October next, at the opening of court on that day, or as soon thereafter as counsel can be heard.

Milwaukee, Sept. 10, 1880.

Yours, &c.,

FINCHES, LYNDE & MILLER,
Pl'ff's Att'y-.

To Jenkins, Elliott & Winkler, Att'y- for Def't.

Service of a copy of above notice admitted, this 10th day of September, 1880.

JENKINS, ELLIOTT & WINKLER,
Att'y- for Def't.

[Endorsed:] Note of issue in the above-entitled cause. Finches, Lynde & Miller, pl'ff's att'ys. Jenkins, Elliott & Winkler, def't's att'ys. Issue of fact for jury. Joined August 26th, 1880. Filed Sep. 18, 1880. Julius Wechselberg, clerk.

Answer.

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
ag'st
JOHN H. WALRATH.

And now comes the above-named defendant, by Jenkins, Elliott & Winkler, his attorneys, and for answer to the plaintiff's complaint herein, denies each and every allegation, matter, fact, and thing in said complaint stated and contained.

JENKINS, ELLIOTT & WINKLER,
Def't's Att'ys.

9 (Endorsed:) Due service admitted this 26th day of August, 1880. Finches, Lynde & Miller, pl'ff's att'ys. Filed Feb. 23, 1881. J. Wechselberg, cl'k.

Names of Jury.

Circuit Court, Milwaukee County.

THE PHŒNIX MUT. LIFE INS. CO. *vs.* JOHN H. WALRATH. } Jury.

Charles Andrew, Leon Howard, A. Schwind, Chas. H. Sweetland, J. B. Neuer, Adolph Eimerman, A. E. Bloss, Thomas Murray, J. S. Mitchell, Wm. Langdon, J. B. Pierce, C. H. Stone.

(Endorsed:) Filed Feb. 23, 1881. J. Wechselberg, clerk.

Affidavit of Jas. G. Jenkins.

COUNTY OF MILWAUKEE, *ss:*

Circuit Court, County of Milwaukee.

THE PHŒNIX MUTUAL LIFE INS. CO. *vs.* JOHN H. WALRATH.

Jas. G. Jenkins, being duly sworn, says that he is one of the attorneys for the defendant; that prior to the time of answering in this cause the defendant had stated to deponent his defence, which deponent has substantially set forth in the proposed amended answer herewith submitted, & sought to be interposed herein; that
10 deponent was then of the opinion that such defence could be made effectually as a defence to the claim of the plaintiff under a general denial, as showing that there was no unlawful conversion of money by the defendant; that if this court on this trial has held differently or should hold differently, the error, if any, was that of deponent and not of the defendant; that deponent then was and

now is of the opinion that the plea or answer interposed (being a general denial) was the proper plea, and if he was or is mistaken therein, he asks leave of the court to file an amended answer herewith submitted, in order that the actual defence of the defendant may properly be presented to the consideration of the jury upon the trial.

That as appears from a letter of the defendant to the president of the plaintiff (a press copy of which is now in deponent's possession and the receipt of which was acknowledged by the president of pl'ff in a letter to def't) the plaintiff was notified, before the suit, of the grounds upon which the defendant would resist the plaintiff's claim, and the claim and defence set up in said proposed amended pleading was known to the officers of the plaintiff prior to this
11 suit; notwithstanding which this deponent offers, if the plaintiff desire, a continuance of this cause by reason of the allowance of the amendment or from any alleged surprise thereat to pay such costs as may be unpaid by the court as a condition of amendment.

JAS. G. JENKINS.

Sworn to before me February 24, 1881.

J. WECHSELBERG, *Clerk.*

(Endorsed:) Filed Feb. 24, 1881. J. Wechselberg, clerk.

Amended Answer.

Circuit Court, County of Milwaukee.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY
vs.
JOHN H. WALRATH.

And now comes the defendant and asks leave to file an amended answer herein as follows:

First. This defendant alleges that in the year 1869 the plaintiff and this defendant entered in an agreement, whereby it was mutually agreed that this defendant should act as the general agent of the plaintiff for the States of Wisconsin and Michigan, except the Northern Peninsula and St. Joseph county, in the latter State, to solicit insurances and collect premiums and generally build up its business
12 of life insurance in said States; that as part of said verbal arrangement and agreement it was understood and agreed that this defendant should have an exclusive right to said territory, and should have a property right in said agency and territory and the business thereof—that is to say, that while the plaintiff might discharge this defendant from said employment at any time it saw fit, yet that such discharge could only be made for cause, and upon payment to this defendant of the value of the interest of this defendant in said business, viz: in the commissions, being 7½% upon all annual premiums in renewal of policies then existing, or which might thereafter be procured by this defendant throughout said territory, issued or to be issued by the plaintiff, and that this defendant might have the right to sell out said agency to any per-

son and for any sum he might obtain, provided such purchaser should be a person acceptable to the plaintiff, and in case of the death of this defendant his widow or legal heirs should have the same right of sale of such agency, and thereafter and in pursuance of such contract and agreement and in reliance thereon this defendant entered upon said employment and appointed a large number
13 of sub-agents in said States and territory, who entered into contract with and gave bonds for the faithful discharge of their duties to the plaintiff, many of which were appointed upon salaries, in portions of such territory where the business was not or but partially inaugurated, and in which cases the business was but inconsiderable, and was to be built up at large expenditure of time and money by this defendant, and which was done by this defendant in the reliance upon his property right in such agency and territory, and in the just expectation in the future of receiving a large income therefrom, and by way of commissions upon renewals of policies from year to year during the continuance of the policies on the lives of the assured; that the actual losses and disbursements of this defendant in the payment of such salaries were upwards of $25,000 over and above all original commissions received upon premiums on policies effected by such salaried agents, and which was borne and expended by this defendant on the faith of and in reliance upon such agreement and in the belief that he had a property right and interest in said business and Territory of which he could not be divested except upon adequate compensation;
14 that during the same period of time, to wit, from the making of said agreement to the month of July, 1880, such sub-agents in said territory, in respect of the payment to the plaintiff of premiums collected by them in many cases made default, and to the amount of about $11,000, which sum this defendant had from time been required by the plaintiff to make good to it and did pay or account for to it upon the supposed fact that they were the agents of this defendant and not of the plaintiff, because the business of said territory belonged to this defendant, and he could not be deprived thereof, or of any commissions thereafter to accrue from the renewal of policies and payment of premiums in said territory without the payment to the defendant of the value of his interest in said business and in all renewal premiums in said territory; that in 1875 new officers of the plaintiff were elected who have since continued to be and now are the officers of the plaintiff, who lately, and a few months prior to this suit, have repudiated the said verbal agreement so made as aforesaid and claim that the same was void, after obtaining from this defendant large sums of
15 money, to wit, about $10,000, upon the faith of such agreement; that it has been the usual custom of the plaintiff in establishing agencies, such as the defendant's, to permit the agents to have and to recognize their right to such property right in the business of such agency, and to sanction their right to sell the same, and to recognize the rights of their heirs so to do, which custom was known to and relied upon by this defendant in making such agreement, and by which agents could not be discharged or deprived of

their agencies without compensation for the value of the business of such agencies; that on or about the 26th day of June, 1880, the plaintiff discharged the defendant from such agency without cause; that at that time the annual premiums collectable through defendant's said agency and in said territory was about forty thousand dollars, upon which the commissions on such premiums accruing to this defendant were about $2,500 per annum, and the annual income of said business thereafter during the life time of all said policies, would equal such sum and said business, and the interest of this defendant in such renewal premiums and business was, as well by the rules adopted by the plaintiff in such cases and for the
16 purchase or sale of agencies in such cases, as in fact worth about $10,000, which sum the plaintiff ought in equity and justice to pay the defendant, and which it was bound to do before it could rightfully deprive this defendant of said business, and by the custom and course of dealing existing between the plaintiff and its agents and this defendant this defendant had the right to retain any sum collected for the plaintiff to pay any just claim this defendant had against the plaintiff, and so he retained such collections in the complaint alleged to apply in liquidation of the claim against the plaintiff.

Second. And for further answer and by way of counterclaim, this defendant alleges that at all the times hereinafter mentioned this defendant was and still is a citizen and resident of the State of Wisconsin, and the plaintiff was and is a non-resident of the State of Wisconsin, and a foreign corporation created and existing under and by virtue of the laws of the State of Connecticut, and the cause of action hereinafter set forth arose within this State and existed at the commencement of this action.

17 This defendant alleges that in the year 1869 the plaintiff and this defendant entered into an agreement, whereby it was mutually agreed that this defendant should act as the general agent of the plaintiff for the States of Wisconsin and Michigan, except the Northern Peninsula and St. Joseph's county in the latter State, to solicit insurance and collect premiums, and generally build up its business of life insurance in said State; that as part of said verbal arrangement and agreement it was understood and agreed that this defendant should have an exclusive right to said territory, and should have a property right in said agency and territory and the business thereof, that is to say, that while the plaintiff might discharge this defendant from said employment at any time it saw fit, yet that such discharge could only be made for cause, and upon payment to this defendant of the value of the interest of this defendant in said business, viz., in the commissions, being 7½ % upon all annual premiums in renewal of policies then existing or which might thereafter be procured by this defendant throughout said territory, issued or to be issued by the plaintiff, and that
18 this defendant might have the right to sell out said agency to any person and for any sum he might obtain, provided such purchaser should be a person acceptable to the plaintiff, and in case of the death of this defendant, his widow or legal heirs

should have the same right of sale of such agency; and thereafter, and in pursuance of such contract and agreement, and in reliance thereon, this defendant entered upon said employment and appointed a large number of sub-agents in said States and territory, who entered into contract with and gave bonds for the faithful discharge of their duties to the plaintiff, many of which were appointed upon salaries in portions of such territory where the business was not or but partially inaugurated, and in which cases the business was but inconsiderable, and was to be built up at large expenditure of time and money by this defendant and which was done by this defendant in the reliance upon his property right in such agency and territory, and in the just expectation in the future of receiving a large income therefrom and
19 by way of commissions upon renewals of policies from year to year during the continuance of the policies on the lives of the assured; that the actual losses and disbursements of this defendant in the payment of such salaries were upwards of $25,000 over and above all original commissions received upon premiums on policies effected by such salaried agents, and which was borne and expended by this defendant in the faith of and in reliance upon such agreement, and in the belief that he had a property right and interest in said business and territory of which he could not be divested except upon adequate compensation; that during the same period of time, to wit, from the making of said agreement to the month of July, 1880, such sub-agents in said territory, in respect of the payment to the plaintiff of premiums collected by them in many cases made default and to the amount of about $11,000, which sum this defendant had from time to time been required by the plaintiff to make good to it, and did pay or account for to it upon the supposed fact that they were the agents of this defendant and not of
20 the plaintiff, because the business of said territory belonged to this defendant, and he could not be deprived thereof or of any commissions thereafter to accrue from the renewal of policies and payment of premiums in said territory, without the payment to this defendant of the value of his interest in said business and in all renewal premiums in said territory; that in 1875 new officers of the plaintiff were elected who have since continued to be, and now are, the officers of the plaintiff, who lately, and a few months prior to this suit, have repudiated the said verbal agreement so made as aforesaid, and claim that the same was void after obtaining from this defendant large sums of money, to wit, about ten thousand dollars, upon the faith of such agreement; that it has been the usual custom of the plaintiff in establishing agencies, such as the defendant's, to permit the agents to have and to recognize their right to such property right in the business of such agencies and to sanction their right to sell the same and to recognize the rights of their heirs so to do, which custom was known to and relied
21 upon by this defendant in making such agreement, and by which agents could not be discharged or deprived of their agencies without compensation for the value of the business of such agencies; that on or about the 26th day of June, 1880, the plaintiff discharged the defendant from such agency without cause; that at

that time the annual premiums collectable through defendant's said agency and in said territory was about $40,000, upon which the commissions on such premiums accruing to this defendant were about $2,500 per annum, and the annual income of said business thereafter during the lifetime of all said policies would equal such sum and said business, and the interest of this defendant in such renewal premiums and business was, as well by the rules adopted by the plaintiff in such cases, and for the purchase or sale of agencies in such cases, as in fact, worth about $10,000.

Wherefore this defendant demands judgment against the plaintiff for the sum of fifteen thousand dollars damages, sustained by this defendant by reason of the breach of said contract by the plaintiff.

JENKINS, ELLIOTT & WINKLER,
Att'ys for Def't.

22 STATE OF WISCONSIN, } ss:
Milwaukee County, }

John H. Walrath, being duly sworn, deposes and says: That he is the defendant in the above-entitled action; that he has read the foregoing answer, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those he believes it to be true.

JOHN H. WALRATH.

Subscribed and sworn to before me, this 24th day of February, 1881.

T. B. ELLIOTT,
Notary Public.

(Endorsed:) Filed Feb. 24, 1881. Julius Wechselberg, clerk.

Judge Small's Charge.

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE CO.
vs.
JOHN H. WALRATH.

Judge's charge.

GENTLEMEN: Under the circumstances of this case, if the parties have nothing further to say, the court, in the discharge of its judicial duty, must direct you to render a judgment in favor of the pl'ff for the sum of 9,172.22.

PL'F'S COUNSEL: I suppose the form of verdict will be that
23 the jury find for the pl'f, & assess his damages at the sum of so much.

COURT: Yes; you may draw your verdict & have the foreman sign it.

PL'F'S COUNSEL: There is no necessity of that; the clerk may record it.

COURT TO JURY: That is your verdict? So say you all?

Def't's counsel excepts to the court's directing the jury to find for the pl'f.

(Endorsed:) Filed Feb. 24, 1881. J. Wechselberg, clerk.

Motion of Defendant for a New Trial.

Circuit Court, County of Milwaukee.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY
against
JOHN H. WALRATH.

And now comes the defendant, and upon the record of said cause and the trial thereof, and the judge's minutes of the rulings, and evidence given upon said trial, moves the court now here to vacate and set aside the verdict herein, and to grant a new trial of this cause.

JENKINS, ELLIOTT & WINKLER,
Att'ys for Def't.

(Endorsed:) Filed Feb. 28, 1881. Julius Wechselberg, clerk.

24 *Stipulation for Taxation of Costs.*

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plaintiff,
vs.
JOHN H. WALRATH, Defendant.

It is hereby stipulated that the costs in above-entitled action may be taxed at $25.00, and that the disbursements may be taxed at $46.11, and that judgment be entered and proceedings stayed 60 days from the 24th day of February, 1881.

JENKINS, ELLIOTT & WINKLER,
Att'ys for Def't.

(Endorsed:) Filed May 2, 1881. J. Wechselberg, clerk.

Judgment.

THE STATE OF WISCONSIN, } *ss:*
Milwaukee County, }

Circuit Court. May Term, 1881.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plaintiff,
against
JOHN H. WALRATH, Defendant.
} No. 6570. Judgment.

Judgment. May 2, A. D. 1881.

This action being at issue, and having been tried on the issue of

fact before the Honorable David W. Small, judge of this court, and a jury, on the 23 & 24th days of February, A. D. 1881, and
25 the verdict of the jury having been entered, whereby they find for the plaintiff, and assess its damages at the sum of nine thousand one hundred seventy-two dollars and twenty-two cents:

Now, upon the motion of Finches, Lynde & Miller, attorneys for the plaintiff, it is hereby adjudged that The Phœnix Mutual Life Insurance Company of Hartford, Connecticut, the plaintiff, recover of John H. Walrath, the defendant, the aforesaid sum of ninety-one hundred & seventy-two dollars and twenty-two cents, together with the sum of one hundred ninety-two dollars and thirty-nine cents, costs and disbursements, amounting in the whole to the sum of nine thousand three hundred sixty-four $\frac{61}{100}$ dollars.

JULIUS WECHSELBERG, *Clerk.*

Statement.

Damages	$9,172 22
Costs and disbursements	192 39
	$9,364 61

Judgment docketed May 2d, 1881, at 12.30 o'clock p. m.

(Endorsed:) Filed May 2d, 1881, at 12.30 o'clock p. m. J. Wechselberg, clerk.

26 *Bill of Costs.*

THE STATE OF WISCONSIN, } *ss:*
Milwaukee County, }

Circuit Court. May Term, 1881.

THE PHŒNIX MUT. LIFE INS. CO., Plaintiff, }
against } No. 6570.
JOHN H. WALRATH, Defendant, }

Pl'ff's costs and disbursements.

State tax		$1 00
Tax for clerks salary		8 00
Disbursements as per stipulation filed	$37 11	
Attorney's fees	25 00	
Interest on verdict	121 28	
		183 39
		$192 39

Costs and disbursements examined and taxed at the sum of one hundred ninety-two dollars and thirty-nine cents.

Dated Milwaukee, May 2d, A. D. 1881.

JULIUS WECHSELBERG, *Clerk,*
By CHAS. E. WILD, *Deputy Clerk.*

(Endorsed:) Filed May 2d, 1881. J. Wechselberg, clerk.

Undertaking on Appeal.

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,

vs.

JOHN H. WALRATH.

Whereas, on the second day of May, A. D. 1881, in the circuit court of Milwaukee county, The Phœnix Mutual Life Insurance Company, above named, recovered a judgment against John
27 H. Walrath, above named, for three thousand three hundred sixty-four $\frac{100}{100}$ dollars damages and costs. And the above named John H. Walrath, feeling aggrieved thereby, intends to appeal therefrom to the supreme court of the State of Wisconsin:

Now, therefore, we, Harrison Ludington of the city of Milwaukee, county of Milwaukee, and State of Wisconsin, and Rudolph Nunnemacher of the city of Milwaukee, county of Milwaukee, and State of Wisconsin, do hereby, pursuant to the statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against him on said appeal, not exceeding two hundred and fifty dollars.

HARRISON LUDINGTON.
RUDOLPH NUNNEMACHER.

STATE OF WISCONSIN, } *ss:*
Milwaukee County, }

Harrison Ludington, being duly sworn, says: He is one of the subscribers to the foregoing undertaking; that he is a resident of the State of Wisconsin, and is worth the sum of five hundred dollars over and above all his debts and liabilities, in property within the State of Wisconsin, not by law exempt from execution.

HARRISON LUDINGTON.

Subscribed and sworn to before me, this 27th day of June, A. D. 1881.
28

A. G. MILLER,
Notary Public, Mil. Co., Wis.

STATE OF WISCONSIN, } *ss:*
Milwaukee County, }

Rudolph Nunnemacher, being duly sworn, says: He is one of the subscribers to the foregoing undertaking; that he is a resident of of the State of Wisconsin, and is worth the sum of five hundred dollars over and above all his debts and liabilities, in property within the State of Wisconsin, not by law exempt from execution.

RUDOLPH NUNNEMACHER.

Subscribed and sworn to before me, this 28th day of June, A. D. 1881.

A. G. MILLER,
Notary Public, Mil. Co., Wis.

(Endorsed:) Due service admitted June 29th, 1881. Finches, Lynde & Miller, pl'ff's att'ys. Filed Jun. 29, 1881. Julius Wechselberg, clerk.

Notice of Appeal.

Circuit Court, County of Milwaukee.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
against
JOHN H. WALRATH.

GENTS: Please take notice that the defendant, John H. Walrath, hereby appeals to the supreme court of the State of Wisconsin from the judgment rendered by the circuit court of the county of
29 Milwaukee in the above-entitled action in favor of the plaintiff above named against the above-named defendant, John H. Walrath, for the sum of nine thousand three hundred and sixty-four dollars and sixty-one cents, and from the whole and every part of said judgment.

Dated Milwaukee, June 28, 1881.

Yours, &c.,

JENKINS, ELLIOTT & WINKLER,
Att'y's for Def't.

To Finches, Lynde & Miller, Esq., Pl'ff's Att'ys.

JULIUS WECHSELBERG, ESQ., *Clerk.*

(Endorsed:) Due service admitted June 29, 1881. Finches, Lynde & Miller, pl'ff's att'ys. Julius Wechselberg, clerk. Filed June 29, 1881. Julius Wechselberg, clerk.

Certificate of Clerk to Return on Appeal.

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONN., Pl'ff & Respondent,
against
JOHN H. WALRATH, Def't & Appellant. } 6570.

STATE OF WISCONSIN, *Milwaukee County,* } *ss:*

I, Julius Wechselberg, clerk of the circuit court in and for the county of Milwaukee, and State of Wisconsin, do hereby certify that the process, pleadings, and other papers hereunto annexed are the originals and all the papers filed in the above-entitled action,

and that the same are herewith transmitted to the supreme
30 court of the State of Wisconsin, pursuant to notice of appeal hereto annexed.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at Milwaukee, the twenty-ninth day of June, A. D. 1881.

[SEAL.] JULIUS WECHSELBERG,
Clerk of the Circuit Court, Milwaukee County, Wisconsin.
By CHAS. E. WILD, *Deputy Clerk.*

Bill of Exceptions.

Circuit Court, County of Milwaukee.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY
against
JOHN H. WALRATH.

And afterwards, to wit, on the 23rd day of February, 1881, the issue aforesaid came on to be tried before the court, the Hon. David W. Small, judge thereof, presiding, and a jury for that purpose duly empannelled and sworn, and upon said trial the plaintiff, to prove and maintain the issue on its part, called as a witness the defendant—

JOHN H. WALRATH, who, being duly sworn, testified as follows: "I am the defendant in this suit; I was the agent of the plaintiff in the city of Milwaukee, in the year 1880; had been such agent
31 since the spring of 1866. I was first appointed general agent November 15, 1865. I have in my possession the original contract that was made with me as such agent."

The plaintiff thereupon offered in evidence a contract made between the parties, dated November 15, 1865.

The defendant objected thereto, on the ground that it is a contract for three years, ending in 1868, twelve years before the transaction, and is not shown to cover this transaction. The court overruled the objection and the defendant excepted.

The contract was thereupon read in evidence, and a copy thereof is hereunto aanexed, marked "Exhibit A," and forms part hereof.

The plaintiff thereupon offered in evidence a bond executed to the plaintiff by the defendant as principal, with Thomas B. Tyler H. Greve as sureties, dated November 7, 1865.

The defendant objected thereto. The court overruled the objection and the defendant excepted.

The bond was thereupon read in evidence, and a copy thereof is hereto annexed, marked "Exhibit B," and forms part hereof.

The witness continued: I never gave to the company any other or different bond. In the year 1880 I made monthly returns to the plaintiff, except that the return for the month of April was sent with the May return, at the end of the latter month. Up to the first of April I had not paid over to the plaintiff all premiums received, less commissions and dividends. I was behind $4,000 to $5,000 dollars on premiums collected by me since January 1, 1880.

I was engaged in speculation some of the time from January, 1880, to April, 1880, in grain and provisions, and also in stocks, in the Chamber of Commerce in the city of Milwaukee, and occasionally in bucket-shops. A bucket-shop is where they deal in stocks and grain and provisions.

32 Q. State to the jury how they deal in bucket-shops?

A. Putting up margins; when you think the market is going up you buy stock and you put up what is called margins, and if the market goes against you, you may lose the margins, if it goes in your favor you may make some money.

Q. Of the premiums of insurance which you received as agent of the plaintiff, did you use any portion of them in these speculations?

A. I used what I considered my own money.

Objected to by defendant.

Objection overruled, and exception by defendant.

Plaintiff's counsel moved to strike out the answer, as not responsive to the question.

COURT: I think the question should be answered affirmatively.

WITNESS: I used moneys collected as premiums on policies in the Phœnix Mutual Life Insurance Company, that I considered my own.

Q. What amount of moneys did you collect as premiums, and have on hand as such, at the date of the commencement of this

33 suit—this suit was commenced, summons served on you, according to the return, on the 19th of July, 1880.

Objected to by defendant.

Objection overruled, and exception by defendant.

DEFENDANT'S COUNSEL: There are those reports of yours (showing witness reports).

A. The cash collections, May report, $7,930.70. That does not cover everything up to the 19th of July. The amount, as near as I can state, which I had collected and had on hand at the date of the commencement of this suit was $2,500.00. The total amount collected in cash may have been in the neighborhood of $4,000.00. Of the amounts collected I deposited some of it in bank; I cannot answer how much was deposited—the most of it, probably—and drew checks as I needed it. It was deposited with Houghton Brothers & Co. I have not here in court the bank-book, which shows the entries of the deposits made from April down to date of commencement of suit. The book is at my house, I think.

Q. We called for the production of the bank pass-pook, which shows the entries in that bank pass-book of moneys which you had collected for the plaintiff, as agent of the plaintiff, from the 1st of April, 1880, down to the date of the commencement of this

34 suit. Do you decline to produce them, Mr. Walrath?

DEFENDANT'S COUNSEL: Yes, sir.

Q. Have you the checks which you drew on that bank, during the same period of time, here in court?

Objected to by defendant.
Objection overruled, and exception by defendant.

A. Part of them and part not. I think probably some of them are in the bank yet.

Q. Will you produce those checks?

DEFENDANT'S COUNSEL: No, sir.

I have kept no account of the amount expended by me in speculations from the premiums collected by me as agent of plaintiff, from the 1st of January, 1880, to date of commencement of this suit. The losses may have amounted to $2,000.00 during that time; don't think they exceeded that amount. I have no statement anywhere by which I can give to the jury an accurate statement. I am not aware of anything, by way of an entry in my bank-book or by way of checks, that will aid or refresh my memory on that subject. I cannot tell the jury the amount of moneys collected by me as
35 agent, which I have lost in these speculations. I lost these moneys from time to time in speculations.

Q. Commencing when and down to what time?

A. The first of my speculations was after I satisfied myself that it was impossible for the present officers of the company and myself to agree as to my rights; that I could not obtain them from them.

Plaintiff's counsel objects to this answer, and moves to strike it out as not responsive to the question.

COURT: It may be struck out.

(Exception by defendant.)

A. From the year 1877, in the summer, towards the close of the Russian war, to the culmination of this affair—I mean the Turkish war.

Q. What amount of moneys of the plaintiff that you had collected as its agent, as near as you can tell, did you lose from the first of January, 1880, up to the commencement of this suit?

A. I have answered that question. I answered it, as near as I could tell, probably $2,000.00. I stated before the commissioner that I paid a part of the amount to my bondsman, Mr. Tyler, but it was a mistake. I say now I did not pay it to him, but it was paid
36 to the bank on my note on which he was endorser.

Q. Why did you not send a statement of account in the month of April for that month?

A. I had written them a proposition in March for the purchase of my agency and a transfer of it to Mr. Mansfield, and the company declined to purchase, stating that they had no need to purchase what already belonged to them. I have seen for years the impending storm coming, and I consulted counsel as to my rights in the agency on both theories—that the agency was mine, or that it belonged to the company, as its officers claimed, and, under advice of counsel, I collected as many premiums as I could, in order to enforce a settlement of the question that has nearly killed me. I first asked counsel if I could not bring suit against the company. He said, who will

you serve papers on; you cannot serve them on yourself. (I was the attorney for the company in this State, to receive service.) And when he asked me if the company had any property in this State that could be attached, I answered no, not recalling at the time some real estate owned by it. I was advised that the only way I could do was to collect, as I stated, as large an amount of premiums as possible, in order to force the fight, and I omitted to send a report for April principally for that reason. I advised with my counsel.

Q. Why do you use the words "principally for that reason"? What other reason had you?

A. I may say entirely for that reason, for I considered that any amount I could get in my possession was mine, to do with as I saw proper.

Q. Was that the sole reason you did not make a return in April?

A. I might say it was. I had lost very little money in Chicago in the month of April. I was not in Chicago speculating. I was engaged in speculation, as I have admitted, from January to the time this suit was commenced. I was not wholly engaged in speculation. A good share of the time was spent in connection with the business of the company, in collecting the premiums on policies in force and seeing to the reports. I had about $2,000.00 to
37 $2,300.00 of money on hand at the date of the first demand; that is all I had of the premiums which I had collected. The first demand was made on me, by the plaintiff, on the 26th June; this is the demand.

The demand was thereupon offered and read in evidence by the plaintiff, and a copy thereof is hereto annexed, marked "Exhibit C," and forms part hereof.

I made a report during the first half of June, of all premiums collected in April and May.

Q. Was that report made out by you without consultation with anyone?

Objected to. Objection overruled.
Exception by defendant.

A. It was made out and forwarded by the advice of my counsel, and after consultation with him. The report shows that up to May 31st, $7,930.70 had been collected without any deduction. It was made out and forwarded to the company. The report I forwarded is now here in court. It shows collections to May 31, 1880, $7,930 70, without deductions for commissions or otherwise. I subsequently made report of June collections. I did not turn over to Dr. Miller the money which these reports show I had collected.

Cross-examination:

Q. Was this contract of 1865 offered in evidence in force between you and the plaintiff after its expiration by its terms?

To which question the plaintiff objected. The court sustained the objection and excluded the question, and to such ruling the defendant excepted.

38 The witness continued: This contract of Novemeber 15, 1865, was not and is not the contract under which I was agent for the plaintiff in 1880. I made reports to the plaintiff in June and July, 1880, of all premiums collected by me. None were omitted that I am aware of.

Q. Did you also send to the company an account current of collections and offsets to collections, showing the amount due from it to you?

The plaintiff objected to the question. The court sustained the objection and disallowed the question, and the defendant excepted.

The plaintiff hereupon rested its case.

The defendant, to prove the issue on his part, was thereupon recalled in his own behalf and testified as follows:

In 1866 Joseph Fessenden was president, H. J. Morse was vice-president and James F. Burns was secretary of the plaintiff, and remained in office until June, 1875, except Mr. Morse, who retired in 1867. At the time of the contract of 1865, Mr. French was agent of the plaintiff for St. Joseph's county, Michigan. I received this letter of Feburary 12th, 1865, from Mr. Morse, vice-president, in due course of mail.

The letter was thereupon offered in evidence. The plaintiff's counsel demanded the purpose in offering it, to which the defendant's counsel replied that the defendant proposed to show that there was no unlawful conversion of this money, and that with reference to this very business under the contract, under which the defendant received the money, he had a right to retain the money collected by him for certain claims of his in that business, growing out of the business connected with it and connected with the very money he received.

The plaintiff's counsel thereupon objected to the letter as immaterial, and upon that objection the court ruled as follows:

"It is wholly immaterial, so far as the merits of the case are concerned, whether there is a plea of general denial or there are special pleas set up, and then a general denial to everything that is not admitted; the case must be disposed of upon the well settled practice of courts in relation to actions of tort. Now, a general denial puts in issue only the material facts that are charged:

First, the receipt of the money; the question of the ownership of the money; and the conversion. The law says that the receipt of the money of another, and a demand by him for that money, and a refusal to pay it over, is *prima facie* evidence of conversion. The defendant, in my judgment, in this action, under this proceeding may show first, either that he never received the commissions or premiums; or secondly, that he has paid them all up. That is all that he can show. He cannot show or set up, in my judgment, any outstanding damages on a contract or any outstanding contract or arrangement by which money was paid in any other way, because that is not germane to the present action of tort, to recover the amount of money refused by him to pay over, admitted by him to be col-

lected as premiums; and that is all there is of this case, in my judgment."

And thereupon sustained the objection, and refused to allow the letter to be read, and to which ruling the defendant excepted.

39 The portion of the letter, so far as material to the case, is as follows:

"We did not notice that Burr Oak was in St. Joseph's county. Under our arrangement with Mr. French, that county belongs to him. Perhaps by and by a satisfactory arrangement may be made with him to relinquish it."

The witness continued: I received from Mr. Morse, vice-president, this letter, dated July 3, 1866, in due course of mail.

Which letter was thereupon offered in evidence; objected to by the plaintiff, understanding that it is offered for the same reason and purpose stated before. The court sustained the objection and the defendant excepted.

The letter is as follows:

"*Phœnix Mutual Life Insurance Company.*

E. FESSENDEN, *Pres't.*
H. J. MORSE, *Vice-Pres't.*
J. F. BURNS, *Sec'y.*

HARTFORD, CONN., *July 3d*, 1866.

J. H. Walrath, Esq., ag't, Milwaukee, Wis.

DEAR SIR: We have a letter from Mr. French, in regard to giving up St. Joseph Co., Mich. He is very willing to do all that is right in the matter, but feels that he should be allowed something for it. In this we cannot say that he is wrong, as the territory is his, and he has built up a good business there. He claims that his commissions on old business there is worth $200 a year, and makes a proposition to surrender the field for that amount. This (is) a matter for you to decide. You can determine how much the county is worth to you, and whether you want to meet Mr. French's views. The above is his proposition. He might take less, say $150 per annum, although he says he would rather hold the Co. that let it go anyway. 'Still,' he says, 'I am disposed to accommodate all interested.'

Please give us your views in the matter. It might suit you better to make him a per cent. allowance on all the renewals you actually collect. Or, if you don't desire to do either, perhaps he would be willing to allow you to do new business there, he to retain the old.

You can judge best how this would work. We desire to see all parties satisfied. Advise us what we shall say to him for you.

Very truly yours, H. J. MORSE, *V. P.*"

The witness continued: After the expiration of the contract of 1865, I had an interview at Hartford, Conn., with the secretary of the plaintiff, Mr. Burns.

Q. State what took place at that interview.

The question was objected to by the plaintiff.

40 Objected to as irrelevant, incompetent, and immaterial, unless the counsel states the purpose for which he puts the question and what he designs to prove.

The court sustained the objection and disallowed the question.

To which ruling the defendant excepted.

Q. Did you at that interview have any negotiations with reference to your future relations to the company, and state what it was.

The counsel for the plaintiff asked the purpose of the question.

The counsel for the defendant replied that the defendant proposed to show that there was no such contract in existence as that offered in evidence by the plaintiff, but that there was a new and different contract made.

The counsel for the plaintiff thereupon objected to the question as immaterial.

The court sustained the objection and disallowed the question.

To which ruling the defendant excepted.

Q. Did you at that time enter into a new and independent contract with the company, and what was it?

The counsel for the plaintiff objected to the question.

PLAINTIFF'S COUNSEL: What is your purpose in putting that question?

DEFENDANT'S COUNSEL: To bring out the facts.

Objected to, unless counsel states what his purpose is in asking the question. If he had a separate and independent contract, and claimed the right to withhold this money, then I object to it as not competent evidence under the issue made in this case.

41 The court sustained the objection and disallowed and rejected the question.

To which ruling the defendant excepted.

The counsel for the defendant thereupon asked the court if the ruling upon the foregoing question was made upon the ground of any defect in the pleadings, and the court replied, "Not at all."

The counsel for the defendant thereupon repeated the question to the witness and offered to show by him, that in 1870 the plaintiff, by its officers, and the defendant agreed verbally that he should have the general agency of the States of Wisconsin and Michigan, upon a percentage then agreed upon between them; that he should have the exclusive right to act for the company in that Territory; that he should have a property right in that agency, and should have a right to sell it out at his pleasure to any person that he saw fit and that was acceptable to the company, and that in case of his death, his widow or heirs should have the like right; and that the plaintiff agreed that the company would draw up a written contract, embodying those terms, and deliver it to the defendant; that thereupon and in pursuance of that agreement, and in reliance upon those assurances the defendant appointed a large number of agents, who were selected by the plaintiff, and who respectively entered into

written contracts with the plaintiff, and gave bonds to the plaintiff for the faithful discharge of their duties.

That many of those agents, in territories not worked up, and where there was no business, were appointed upon salaries; that the business, or the commissions, allowed by that agreement upon such business in the case of salaried agents did not amount for many years to 50 per cent. of the salary paid, and that the losses accruing therefrom were upwards of $12,000, which were borne by the defendant, in reliance upon the agreement and the promise of the plaintiff. That the losses from defaulting sub-agents so appointed in the defendant's territory were upwards of $30,000, which the defendant had from time to time made good to and paid the plaintiff, and which were required by the plaintiff to be paid, upon the ground that the business was the business of the defndant, and that he had a property right therein of which the plaintiff could not deprive him; that in 1875 a new set of officers were elected, who have since continued in office; and that from year to year, and time to time, the defendant has solicited the plaintiff and its officers to place such agreement in writing and to execute and deliver such contract as promised, and that they have from time to time evaded and postponed the same up to the time when the defendant was dismissed from his agency; that it has been the custom of the plaintiff so to permit agents to have and to recognize their right to a property interest in such agency, and has in many cases itself paid to such agents large sums of money as the value of such agency; that the value of the business so worked up by the defendant at the time he was removed from his agency was upwards of $12,000; that upon the plaintiff's repudiating the arrangement made with the defendant and upon their refusal to recognize his right to any property interest in that agency, he submitted to them a statement of all losses by de-
42 faulting agents and of losses on salaried agents of the plaintiff, which he had paid to the plaintiff under the understanding before stated, and requested that it should be allowed since it had been paid by him upon the assurance of the officers of the plaintiff hereinabove stated; and that the plaintiff refused so to allow it, or refused to allow any right of the defendant to that business, and asserted its right to remove him at its pleasure; that the business so built up by the defendant, at the time he was removed under the notice given in evidence by the plaintiff was worth to the plaintiff $50,000 a year, upon which his commissions were upwards of $3,500 a year, and that the business was worth to the defendant at that time by the rules adopted by the company in such cases, and in case of the purchase of agencies by the company, $12,000; and that thereafter and upon such removal, and upon such refusal of the company, the defendant retained in his hands the sum of money specified in his account, as he claimed he had the right to do.

To which offer the counsel for the plaintiff objected upon the grounds—

First. That it forms the subject-matter of a counter-claim, if anything, and there is no pleading here by way of counter-claim.

Second. That it is irrelevant and immaterial to the issue upon the pleadings as they now stand.

Third. That it does not tend to prove that the defendant did not collect the premiums as charged, nor that he had paid them to the plaintiff.

Which objection was sustained by the court and the question and offer was disallowed, to which ruling the defendant excepted.

DEFENDANT'S COUNSEL: I want it stated in the record that it is not ruled out upon the ground of the pleading.

PLAINTIFF'S COUNSEL: I do not want to waive that point if the court puts it on the pleading.

COURT: That you have the right to retain.

DEFENDANT'S COUNSEL: It is fair to us that the court should state that it is not ruled out upon the ground of the pleading.

In delivering its judgment the court remarked, "without deciding whether this matter should be set up either by way of plea or counter-claim, I do not think it material either way. I do not think the issue is material under the plea of a general issue, and I have grave doubts whether it could be set up by special plea. I
43 think if the defendant has any remedy here at all, it is upon commissions against the company for their matters which arose outside of the collection of premiums."

The counsel for the defendant thereupon repeated the foregoing question to the witness and in connection therewith offered to prove as last above offered, and offered to prove in addition thereto a recognized right and custom between the plaintiff and defendant, by which the defendant had the right to retain from collections made by him any sum of money for which the plaintiff was indebted to him.

To which the plaintiff objected: We take the same objections to that that we took to the previous offer.

COURT: I am very clear that such a defence of custom must be specially pleaded, if possible, to get it in such a case as this, and not being pleaded it certainly is immaterial.

The court sustained the objection and ruled out the question and offer, to which ruling the defendant excepted.

The counsel for the defendant thereupon tendered to the court an amended answer (which is hereto annexed, marked "Exhibit D," and forms part hereof,) and asked leave to file the same as an answer in this cause, and accompanied such application with the following affidavit, which was filed on such application:

Circuit Court, County of Milwaukee.

THE PHŒNIX MUTUAL LIFE INS. CO. *vs.* JOHN H. WALRATH.

COUNTY OF MILWAUKEE, *ss:*

Jas. G. Jenkins, being duly sworn, says that he is one of the attorneys for the defendant; that prior to the time of answering in

this cause the defendant had stated to deponent his defence, which deponent has substantially set forth in the proposed amended answer herewith submitted, and sought to be interposed herein; that deponent was then of the opinion that such defence could be made effectual as a defence to the claim of the plaintiff under a general denial, as showing that there was no unlawful conversion of money by the defendant; that if this court on this trial has held differently or should hold differently, the error, if any, was that of deponent, and not of the defendant; that deponent then was, and now is, of the opinion that the plea or answer interposed (being a general
44 denial) was the proper plea, and if he was or is mistaken therein he asks leave of the court to file an amended answer herewith submitted, in order that the actual defence of the defendant may properly be presented to the consideration of the jury upon this trial.

That as appears from a letter of the defendant to the president of the plaintiff (a press copy of which is now in deponent's possession, and the receipt of which was acknowledged by the president of plaintiff, in a letter to defendant) the plaintiff was notified before this suit, of the grounds upon which the defendant would resist the plaintiff's claim, and the claim and defence set up in said proposed amended pleading was known to the officers of the plaintiff, prior to this suit; notwithstanding which this deponent offers, if the plaintiff desire a continuance of this cause, by reason of the allowance of the amendment, or from any alleged surprise thereat, to pay such costs as may be imposed by the court as a condition of amendment.

JAS. G. JENKINS.

Sworn to before me, February 24th, 1881.

J. WECHSELBERG, *Clerk.*

To which the plaintiff objected. The court sustained the objection, and refused leave to the defendant to amend or to file or serve such answer, upon the ground that he had no authority so to do, or to permit upon the trial such a change of pleading; and to such ruling the defendant excepted.

The counsel for the defendant thereupon offered to prove by the witness the facts stated in such proposed amended answer, to which offer the plaintiff objected. The court sustained the objection and refused to permit proof of the facts alleged in such answer. To which ruling the defendant then and there excepted.

DEFENDANT'S COUNSEL: "The amount of the collections, less the commissions which I do not dispute, we have received, and which the plaintiff, in a round about way, has proven, is $9,172.22."

The parties then rested and the foregoing is all the evidence given upon said trial.

The court thereupon directed the jury to return a verdict for the plaintiff for the sum of $9,172.22. To which ruling the defendant excepted.

And the jury so did.

And because the evidence given on said trial, and the rulings of the court thereon, and the offers made by the defendant, do
45 not appear by the record of said trial, therefore, on the prayer of the defendant, by his counsel, the circuit judge who tried the said cause hath to this bill of exceptions hereto set his hand and seal this 24th day of February, 1881.

DAVID W. SMALL, [SEAL.]
Circuit Judge.

46 "EXHIBIT A."

This contract, made and entered into this fifteenth day of November, in the year of our Lord one thousand eight hundred and sixty-five, between J. H. Walrath, of Sparta, county of Munroe, and State of Wisconsin, party of the first part, and the Phœnix Mutual Life Insurance Company, of the city and county of Hartford, and State of Connecticut, party of the second part, witnesseth:

First. That the party of the first part for and in consideration of the sum of one dollar, to him in hand paid, and other considerations hereinafter set forth, doth covenant and agree to act as the general agent of the party of the second part, in the territory hereinafter mentioned, for the full period of three years from the date hereof, provided this contract shall not sooner terminate, and it is agreed that it may terminate upon either party serving three months' written notice within three months after the expiration of one year from the date hereof.

Second. That the territory assigned to said party of the first part shall be the State of Wisconsin and that part of the State of Michigan lying south of the Straits of Mackinaw, except the county of St Joseph's: Provided, That if at any time after six months from the date hereof it shall appear to said company that said party of the first part cannot or does not work this entire field to the satisfaction of said company, then said party of the first part shall retire from Michigan upon two months' notice from said company, and thereafter said territory shall consist of the State of Wisconsin: Provided further, That if at any time said company shall cease doing new business in Wisconsin, then said party of the first part shall retain said Michigan, and also collect all renewals due said company in said Wisconsin.

Third. That said party of the first part agrees to take up his
47 residence in such place as may be mutually agreed upon between said parties, and to devote his whole time, talents, and energies to advancing the interests of said company, by soliciting applications for insurance in said company, by collecting premiums thereon, by appointing and keeping at work sub-agents for the same purpose, and generally to forward the business of said company in said territory by all the means in his power.

Fourth. That the said party of the first part agrees to remit the funds belonging to said company, to their office in Hartford, by sight draft on New York, whenever the sum of two hundred dollars so belonging to said company shall accumulate in his hands, and on the last day of each and every month to make out and transmit

to said company a faithful report of all policies received and delivered by him or by his agents during said months, accompanied by sight draft on New York for any balance due said company, together with a list of all policies then remaining in his hands or the hands of his agents; and the said party of the first part further agrees to obey all instructions of said company that he may receive from time to time in reference to reports, remittances, return of policies, and the manner of transacting business.

Fifth. That the said party of the first part agrees, on honor, that whenever his connection with said company shall cease he will not, directly or indirectly, endeavor to prevent any person from renewing any policy of insurance with said company.

Sixth. That the said party of the second part agrees to pay to said party of the first part, as compensation for his services, twenty per cent. on all first premiums and seven and one-half per cent. on all renewal premiums collected by himself or by his agents; and all compensation to his said agents is to be paid by the party of the first part out of the aforesaid per cent.

Seventh. That said party of the second part agrees to fur-
48 nish the party of the first part with all necessary books, stationery, and stamps, used for transaction of the business of said company, all books and accounts to be at all times open to inspection by any officer of said company, or any person appointed for that purpose.

In witness whereof, the party of the first part and the party of the second part, by their president, do affix their names and seals to this contract, on the day and date before named.

(Stamp.) JOHN H. WALRATH. [SEAL.]

Witnesses:
A. B. GOODRICH.
R. A. ROBERTSON.

E. FESSENDEN, [SEAL.]
President.

Witnesses:
W. J. MORSE.
J. F. BURNS.

"EXHIBIT B."

Phœnix Mutual Life Insurance Company.

Know all men by these presents that we, John H. Walrath, as principal, and Thos. B. Tyler and H. Greve, as sureties, are held and firmly bound unto the Phœnix Mutual Life Insurance Company, (a company incorporated by General Assembly of the State of Connecticut, and having an office and place of business in Hartford, in State of Connecticut,) in the penal sum of three thousand dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents.

The conditions of this bond are such, that whereas the
49 said John H. Walrath has been appointed an agent of said company; now if the said John H. Walrath shall well and truly execute the office of agent of said company, and faithfully account for and pay over to said company all moneys received by him, as agent of the same, according to the rules established by said company for the regulation of agencies, which are, that all moneys in the hands of agencies shall be paid over to the secretary of said company, on or before the first day of each month, then this obligation shall be void; otherwise, in full force and effect.

In witness whereof, we have hereunto set our hands and seals.

Dated at Sparta, this 7th day of November, A. D. 1865.

(Signed)	JOHN H. WALRATH.	[L. S.]
(Signed)	THOS. B. TYLER.	[L. S.]
(Signed)	H. GREVE.	[L. S.]

(Stamp.)

"EXHIBIT C."

MILWAUKEE, *June 26th*, 1880.

To John H. Walrath.

SIR: You are hereby notified that you have been removed as general agent of the Phœnix Mutual Life Insurance Company of Hartford, Connecticut, for Michigan and Wisconsin, and I hereby demand that you deliver to me the money, books, papers, and all other property received by you, or in your possession, belonging to said company.

Yours,

GEO. S. MILLER,
Supt. of Agencies,
Phœnix Life Insurance Company of Hartford.

50 "EXHIBIT D."

Circuit Court, County of Milwaukee.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY
vs.
JOHN H. WALRATH.

And now comes the defendant and asks leave to file an amended answer herein, as follows:

First. This defendant alleges that in the year 1869 the plaintiff and this defendant entered into an agreement, whereby it was mutually agreed that this defendant should act as the general agent of the plaintiff for the States of Wisconsin and Michigan, except the Northern Peninsula and St. Joseph's county, in the latter State, to solicit insurances and collect premiums, and generally build up its business of life insurance in said States; that, as part of said verbal arrangement and agreement, it was understood and agreed that this defendant should have an exclusive right to said territory, and should have a property right in said agency and territory and the

business thereof, that is to say that while the plaintiff might discharge this defendant from said employment at any time it saw fit, yet that such discharge could only be made for cause, and upon payment to this defendant of the value of the interest of this defendant in said business, viz: In the commissions, being 7½ per cent. upon all annual premiums in renewal of policies then existing, or which might thereafter be procured by this defendant throughout said territory, issued or to be issued by the plaintiff, and that this defendant might have the right to sell out said agency to any person and for any sum he might obtain, provided such purchaser should be a person acceptable to the plaintiff, and, in case of the death of this defendant, his widow or legal heirs should have the same right of sale of such agency; and thereafter, and in pursuance of
51 such contract and agreement, and in reliance thereon, this defendant entered upon such employment, and appointed a large number of sub-agents in said States and territory, who entered into contract with and gave bonds for the faithful discharge of their duties to the plaintiff, many of which were appointed upon salaries, in portions of such territory where the business was not, or but partially, inaugurated, and in which cases the business was but inconsiderable and was to be built up at large expenditure of time and money, by this defendant, and which was done by this defendant in reliance upon his property right in such agency and territory, and in the just expectation in the future of receiving a large income therefrom, and by way of commissions upon renewals of policies from year to year during the continuance of the policies on the lives of the assured; that the actual losses and disbursements of this defendant, in the payment of such salaries, were upwards of $25,000 over and above all original commissions received upon premiums on policies effected by such salaried agents, and which was borne and expended by this defendant on the faith of and in reliance upon such agreement, and in the belief that he had a property right and interest in said business and territory, of which he could not be divested except upon adequate compensation; that during the same period of time, to wit, from the making of said agreement to the month of July, 1880, such sub-agents in said territory, in respect of the payment to the plaintiff, of premiums collected by them, in many cases made default, and to the amount of about $11,000, which sum this defendant had from time to time been required by the plaintiff to make good to it, and did pay, or account for, to it upon the supposed fact that they were the agents of this defendant and not of the plaintiff, because the business of said territory belonged to this defendant, and he could not be deprived thereof, or of any commissions thereafter to accrue from the renewal of policies and payment of premiums
52 in said territory, without the payment to the defendant of the value of his interests in said business, and in all renewal premiums in said territory; that in 1875 new officers of the plaintiff were elected, who have since continued to be and now are the officers of the plaintiff, who lately, and a few months prior to this suit, have repudiated the said verbal agreement so made as aforesaid, and claim that the same was void, after obtaining from this defend-

ants large sums of money, to wit, about $10,000, upon the faith of such agreement; that it has been the usual custom of the plaintiff, in establishing agencies such as the defendant's, to permit the agents to have and to recognize the right to such property right in the business of such agency, and to sanction their right to sell the same, and to recognize the rights of their heirs so to do, which custom was known and relied upon by this defendant in making such agreement, and by which agents could not be discharged or deprived of their agencies, without compensation for the value of the business of such agencies; that on or about the 26th day of June, 1880, the plaintiff discharged the defendant from such agency, without cause; that at that time the annual premiums collectable through defendant's said agency, and in said territory, was about forty thousand dollars, upon which the commissions on such premiums accruing to this defendant were about $2,500 per annum, and the annual income of said business thereafter, during the lifetime of all said policies, would equal such sum, and said business and the interest of this defendant in such renewal premiums and business was, as well by the rules adopted by the plaintiff in such cases, and for the purchase or sale of agencies in such cases, as in fact, worth about $10,000, which sum the plaintiff ought in equity and justice to pay the defendant, and which it was bound to do before it could rightfully deprive this defendant of said business, and, by the custom and course of dealing existing between the plaintiff and its agents and this defend-
53 ant, this defendant had the right to retain any sum collected for the plaintiff to pay any just claim this defendant had against the plaintiff, and so he retained such collections in the complaint alleged, to apply in liquidation of the claim against the plaintiff.

Second. And for further answer, and by way of counter-claim, this defendant alleges that at all the times hereinafter mentioned, this defendant was and still is a citizen and resident of the State of Wisconsin, and the plaintiff was and is a non-resident of the State of Wisconsin, and a foreign corporation created and existing under and by virtue of the laws of the State of Connecticut, and the cause of action hereinafter set forth arose within this State, and existed at the commencement of this action.

This defendant alleges that in the year 1869, the plaintiff and this defendant entered into an agreement whereby it was mutually agreed that this defendant should act as the general agent of the plaintiff for the States of Wisconsin and Michigan, except the Northern Peninsula and St. Joseph's county in the latter State, to solicit insurances and collect premiums, and generally build up its business of life insurance in said States; that, as part of said verbal arrangement and agreement, it was understood and agreed that this defendant whould have an exclusive right to said territory, and should have a property right in said agency and territory and the business thereof, that is to say, that while the plaintiff might discharge this defendant from said employment at any time it saw fit, yet that such discharge could only be made for cause, and upon payment to this defendant of the value of the interest of this defendant in said business, viz: in the commissions being 7½ per cent. upon all annual

premiums, in renewal of policies then existing or which might thereafter be procured by this defendant throughout said territory, issued or to be issued by the plaintiff, and that this defendant might have the right to sell out said agency to any person and for any
54 sum he might obtain, provided such purchaser should be a person acceptable to the plaintiff, and in case of the death of this defendant his widow or legal heirs should have the same right of sale of such agency, and thereafter, and in pursuance of such contract and agreement, and in reliance thereon, this defendant entered upon said employment, and appointed a large number of sub-agents in said States and territory, who entered into contract with and gave bonds for the faithful discharge of their duties to the plaintiff, many of which were appointed upon salaries, in portions of such territory where the business was not, or but partially, inaugurated, and in which cases the business was but inconsiderable, and was to be built up at large expenditure of time and money by this defendant, and which was done by this defendant in the reliance upon his property right in such agency and territory, and in the just expectation in the future of receiving a large income therefrom, and by way of commissions upon renewals of policies from year to year, during the continuance of the policies on the lives of the assured; that the actual losses and disbursements of this defendant in the payment of such salaries were upwards of $25,000, over and above all original commissions received upon premiums on policies effected by such salaried agents, and which was borne and expended by this defendant in the faith of and in reliance upon such agreement, and in the belief that he had a property right and interest in said business and territory, of which he could not be divested except upon adequate compensation; that during the same period of time, to wit, from the making of said agreement to the month of July, 1880, such sub-agents in said territory, in respect of the payment to the plaintiff of premiums collected by them, in many cases made default, and to the amount of about $11,000, which sum this defendant had, from time to time, been required by the plaintiff to make good to it, and did pay or account for to it, upon the
55 supposed fact that they were the agents of this defendant and not of the plaintiff, because the business of and territory belonged to this defendant, and he could not be deprived thereof, or of any commissions thereafter to accrue from the renewal of policies and payment of premiums in said territory, without the payment to this defendant of the value of his interest in said business, and in all renewal premiums in said territory; that in 1875 new officers of the plaintiff were elected, who have since continued to be and now are the officers of the plaintiff, who lately, and a few months prior to this suit, have repudiated the said verbal agreement so made as aforesaid, and claim that the same was void, after obtaining from this defendant large sums of money, to wit, about ten thousand dollars, upon the faith of such agreement; that it has been the usual custom of the plaintiff, in establishing agencies such as the defendant's, to permit the agents to have and to recognize their right to such property right in the business of such agencies, and to sanc-

tion their right to sell the same, and to recognize the rights of their heirs so to do, which custom was known and relied upon by this defendant in making such agreement, and by which agents could not be discharged or deprived of their agencies without compensation for the value of the business of such agencies; that on or about the 26th day of June, 1880, the plaintiff discharged the defendant from such agency without cause; that at that time the annual premiums collectable through defendant's said agency and in said territory was about $40,000, upon which the commissions on such premiums accruing to this defendant were about $2,500 per annum, and the annual income of said business thereafter, during the lifetime of all said policies, would equal such sum, and said business and the interest of this defendant in such renewal premiums and business was, as well by the rules adopted by the plaintiff in such cases and for the purchase or sale of agencies in such cases, as in fact, worth about $10,000.

56 Wherefore this defendant demands judgment against the plaintiff for the sum of fifteen thousand dollars damages sustained by this defendant by reason of the breach of said contract by the plaintiff.

JENKINS, ELLIOTT & WINKLER,
Attorneys for Defendant.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

John H. Walrath, being duly sworn, deposes and says: That he is the defendant in the above-entitled action; that he has read the foregoing answer, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those he believes it to be true.

JOHN H. WALRATH.

Subscribed and sworn to before me, this 24th day of February, 1881.

T. B. ELLIOTT,
Notary Public.

(Endorsed:) Correct. H. M. Finch. April 30, 1881. Filed Sept. 10, 1881. Julius Wechselberg, clerk.

57 *Certificate of Clerk to Supplemental Return.*

STATE OF WISCONSIN, } ss:
Milwaukee County, }

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY
against
JOHN H. WALRATH.

I, Julius Wechselberg, clerk of the county court in and for the county of Milwaukee and State of Wisconsin, do hereby certify that

the bill of exceptions hereto annexed is the original filed in the above-entitled action, and that the same is herewith transmitted to the supreme court of the State of Wisconsin, pursuant to notice of appeal heretofore remitted to said court in the above-entitled action, and that this is a supplemental return in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at Milwaukee, this tenth day of September, A. D. 1881.

[SEAL.] JULIUS WECHSELBERG,
Clerk of the Circuit Court, Milwaukee County, Wisconsin.
By CHAS. E. WILD, *Deputy Clerk.*

(Endorsed:) Filed April 11, '82. J. Wechselberg, clerk.

58 (Beginning of this heading is torn off.)

On the twenty-first day of the term, to wit, on the eighteenth day of October, A. D. 1881—present, Orsamus Cole, chief justice, and William P. Lyon, Harlow S. Orton, David Taylor, and John B. Cassody, associate justices of said court—the following proceedings were had, *inter alia*, to wit:

Remittitur of Clerk of Supreme Court.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Respondent,
vs.
JOHN H. WALRATH, Appellant.

Appeal from circuit court, Milwaukee county, State of Wisconsin.

This cause came on to be heard on appeal from the judgment of the circuit court of Milwaukee county, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the circuit court of Milwaukee county in this cause be, and the same is hereby, reversed, with costs against the said respondent, taxed at the sum of one hundred and twenty-two and $\frac{35}{100}$ dollars.

And that this cause be, and the same is hereby, remanded
59 to the said circuit court with directions to award a *venire facias de novo.*

STATE OF WISCONSIN, } *ss:*
Supreme Court, }

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the court in the above-entitled cause, and that it is a correct transcript therefrom.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Madison, this eighteenth day of October, A. D. 1881.

[SEAL.] CLARENCE KELLOGG,
Clerk of the Supreme Court of the State of Wisconsin.

(Endorsed:) Filed April 11, '82. J. Wechselberg, clerk.

Notice of Trial for May Term, 1882.

Circuit Court, Milwaukee County.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONN.,
Plaintiff,
vs.
JOHN H. WALRATH, Defendant.

Please take notice that the above-entitled action will be brought to trial at the next term of the aforesaid court, to be held at the court-house in the city of Milwaukee, in the said county of
60 Milwaukee, on the first Monday of May next, at the opening of court on that day, or as soon thereafter as counsel can be heard.

April 21, 1882.

Yours, &c.,

FINCHES, LYNDE & MILLER,
Pl'ff's Att'ys.

To Jenkins, Elliott & Winkler, Att'y- for Def't.

Service of a copy of above notice admitted, this April 21, 1882.

JENKINS, ELLIOTT & WINKLER,
Att'y- for Def't.

[Endorsed:] Note of issue in above-entitled cause. Finches, Lynde and Miller, pl'ff's att'y-. Jenkins, Elliott & Winkler, def't's att'y-. Issue of fact for jury. Joined Aug. 26, 1880. Filed April 21, 1882. Julius Wechselberg, clerk.

Order to Show Cause why Amended Answer should not be Filed, &c.

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
ag'st
JOHN H. WALRATH.

Upon the record of this action and the bill of exceptions therein, and the remittitur from and the opinion of the supreme court upon the appeal herein, and upon the affidavit of James G. Jenkins filed herein February 24th, 1881, and the proposed amended answer filed herein on said day—
61 It is, on motion of Jenkins, Elliott and Winkler, attorneys for defendant—

Ordered, That the plaintiff show cause before this court at the court-house, in the city of Milwaukee, on the 20th day of May, 1882, at the opening of the court on that day, or as soon thereafter as counsel can be heard, why the proposed amended answer offered and asked to be filed and served herein at the former trial of this cause, and now on file in the record, should not be filed and served

as the amended answer of the defendant, and stand as such answer of the defendant.

It is further ordered, That a copy of this order be served on the plaintiff or its attorneys on or before the 15th of May, instant.

Dated Milwaukee, May 13th, 1882.

By the court:

CHARLES A. HAMILTON, *Judge.*

(Endorsed:) Service of the within admitted May 13th, 1882. Finches, Lynde & Miller, pl'ff. att'ys. Filed May 20, 1882. J. Wechselberg, clerk.

Motion of Plaintiff for Bill of Particulars of the Defense.

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY
vs.
JOHN H. WALRATH.

62 And now comes the said plaintiff, The Phœnix Mutual Life Insurance Company, by Finches, Lynde & Miller, its attorneys, and moves the court that the said defendant be ordered to furnish the plaintiff within 20 days, as follows, to wit: First, a bill of particulars of the defence in the amended answer contained:

1. By stating the number of sub-agents in said States and Territory appointed by the defendant, in pursuance of the alleged contract between plaintiff and defendant, and who entered into contract with and gave bonds for the faithful discharge of their duties to the plaintiff, and by giving their names and date of appointment, and by stating how many and which of said sub-agents were appointed upon salaries, and how many and which upon commissions.

2. By giving an itemized statement of the alleged losses and disbursements of said defendant in the payment of salaries, which, as is alleged, were upwards of $25,000 over and above all commissions received, by stating when and to whom such salaries were paid.

63 3. By giving an itemized statement of the $11,000 which defendant alleges such sub-agents collected as premiums and made default or failed to pay over and which amount the plaintiff required defendant to pay, giving names of such defaulting agents, how much each was in default, when each was in default, and when the same was paid by the defendant to the plaintiff.

4. By stating specially the dates when the $10,000 were obtained by the officers of the plaintiff from the defendant upon the faith of such alleged agreement, and to what officers of the plaintiff's said sums were paid, giving the names of such officers.

5. By stating when, where, and with what persons or agents it has been the usual custom of the plaintiff in establishing agencies, such as the defendant's, to permit the agents to have and to recognize their right to property right in the business of such agency and to sanction their right to sell the same and to recognize the rights of their heirs so to do.

6. By stating the number of policies, on which the annual
64 premiums collectible by or through defendant's agency were about $40,000, and by stating what was the lifetime of each of such policies, how many and which of them were life policies, and how many and which of them were only for a term of years and for what term of years.

7. By stating how many and which of the policies, on which the annual premiums collectible by or through defendant's agency were about $40,000, have expired by forfeiture, or time, or death.

8. By setting out in full each and all the rules adopted by the plaintiff for the purchase or sale of such agencies by which the alleged agency of defendant was worth $10,000.

Second. A bill of particulars of the counter-claim in the said amended answer contained:

1. By stating the number of sub-agents in said States and territory appointed by the defendant in pursuance of the alleged contract between plaintiff and defendant, who entered into contract with, and gave bonds for the faithful discharge of their duties to, the plaintiff; and by giving their names and date of appoint-
65 ment and by stating how many and which of said sub-agents were appointed upon salaries, and how many and which upon commissions.

2. By giving an itemized statement of the alleged losses and disbursements of the defendant in the payment of such salaries, which, as is alleged, were upwards of $25,000 over and above all commissions received, and by stating when and to whom such salaries were paid.

3. By giving an itemized statement of the $11,000 which defendant alleges such sub-agents collected as premiums and made default or failed to pay over, and which amount the plaintiff required defendant to pay, giving names of such defaulting agents, how much each was in default, and when each was in default, and when the same was paid by the defendant to the plaintiff.

4. By stating specially the dates when the $10,000 were obtained by the officers of the plaintiff from the defendant upon the faith of such alleged agreement, and to what officers of the plaintiff's said said sums were paid, giving the names of such officers.

66 5. By stating when, where, and with what persons or agents it has been the usual custom of the plaintiff in establishing agencies, such as the defendant's, to permit the agents to have and to recognize their right to property right in the business of such agency, and to sanction their right to sell the same and to recognize the rights of their heirs so to do.

6. By stating the number of policies on which the annual premiums collectible by or through defendant's agency were about $40,000, and by stating what was the lifetime of each of such policies, and how many and which of them were life policies, how many and which of them were only for a term of years and for what term of years.

7. By stating how many and which of the policies on which the annual premiums collectible by or through defendant's agency were about $40,000 have expired by forfeiture, or time, or death.

8. By setting out in full each and all the rules adopted by the plaintiff for the purchase or sale of such agencies by which the alleged agency of defendant was worth $10,000, and for the
67 costs of this motion.

FINCHES, LYNDE & MILLER,
P'ff's Att'ys.

Order that the Defendant show cause why said Motion should not be Granted.

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY
vs.
JOHN H. WALRATH.

On the papers, records, and proceedings on file and of record in above-entitled action, and on annexed motion of the plaintiff—

It is ordered, That the said defendant show cause before this court, in the court-room, in the city of Milwaukee, Wisconsin, on Saturday, June 3rd, 1882, at the opening of court on that day, or as soon thereafter as counsel can be heard, why the annexed motion should not be granted with costs, or why the plaintiff should not have such other or different relief as may seem just in the premises.

It is further ordered, That in the meantime, and until the hearing and determination of said motion, all proceedings on the part of the defendant herein be stayed.

It is further ordered, That a copy of this order be served
68 on the attorneys of the defendant on or before Wednesday, May 31, 1882.

Milwaukee, May 31st, 1882.

CHARLES A. HAMILTON,
Circuit Judge.

(Endorsed:) Service of a copy admitted this 31st day of May, 1882. Jenkins, Elliott & Winkler, def't's att'ys. Filed May 31, 1882. J. Wechselberg, clerk.

Affidavit of John H. Walrath.

COUNTY OF MILWAUKEE, *ss:*

Circuit Court, Milwaukee County.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY
vs.
JOHN H. WALRATH.

JOHN H. WALRATH, being duly sworn, says: That he is the defendant in the above-entitled action; that no demand for a bill of particulars, either as to the defensive matter or the counter-claim alleged in the amended answer herein, has ever been made upon deponent, or as he is informed and believes upon his attorneys, except so far as the order to show cause, dated May 31st, 1882, and served on said day, could be construed as such demand.

And deponent further says: That at the time the plaintiff
69 terminated or sought to terminate deponent's agency the books of such agency pertaining to such business, and claimed by the plaintiff as owner thereof, were demanded by and delivered to the plaintiff, to wit, on or about the 26th day of June, 1880; that such books will show and do show the number of sub-agents appointed by deponent pursuant to his contract with the plaintiff who entered into contract with and gave bonds to the plaintiff for the discharge of their respective duties; that copies upon blank forms of all letters of appointment of sub-agents, except as presently mentioned, were on file in deponent's agency and were delivered to the plaintiff by deponent upon demand of the plaintiff upon the termination of such agency, and as deponent believes, are now in possession of the plaintiff; that such copies furnish the names and date of appointment of such sub-agents, and state whether appointed upon salary or upon commission; that the exceptions mentioned are as follows, *i. e.*, E. Walrath appointed in 1866 for the country north and west of the Wisconsin river upon a commission of twen-
70 ty-five per cent. upon all cash original policies, and 20 per cent. all original premiums collected on half-note policies, and 5 per cent. on all renewal premiums; which agency continued until February 1st, 1874, when he was employed upon a salary of $2,400, per annum and expenses; G. A. Fisk appointed in 1870 or 1871, for Michigan and Wisconsin, as deponent now remembers upon the same commission as that given E. Walrath, which continued until August 21st, 1871, when his compensation was changed to a salary of $900.00 per annum and expenses, and so continued until the termination of such agency; there may have been one or two other exceptions, which deponent cannot, now definitely recall, and which he cannot ascertain without an examination of the said books of said agency, and copy letters of appointment, now in possession of the plaintiff.

And deponent further says: That he could not state the number of sub-agents, or give their names, or dates of appointment, or whether upon salary or commission, nor when, nor to whom, salaries
71 were paid without reference to said books and letters of appointment, now in possession of plaintiff, and that he has no means to obtain the same except by reference to said books and papers, and that such information is accessible to plaintiff and not to this deponent.

And deponent further says: That on or about the 17th day of June, 1880, he furnished to the plaintiff a detailed statement of the amounts collected by sub-agents, and in respect to which default was made, with their names and the amount and date of each default; that such statement was made up largely from the books of the agency, which the plaintiff claimed to own, and demanded, and received, and now has in its possession; that such defaults arose from the collection and non-payment by them of premiums upon policies, which premiums were by deponent accounted for to the plaintiff from time to time, and very soon after they were respectively due, in the regular monthly report and account current which

deponent was required to and did make, from time to time, to the plaintiff, and that all such monthly reports and accounts
72 current are now in the possession and under the control of the plaintiff, as deponent verily believes.

That, as deponent believes, the only defaulting sub-agent omitted from such statement was that of L. A. Crandall, who defaulted on or about February 3rd, 1873, to the amount of $129.46, which amount was accounted for by deponent to the plaintiff soon thereafter in his regular and usual report. That such reports were regularly mailed to the company plaintiff, and draft also mailed to the company plaintiff, and its receipt from time to time acknowledged to deponent by letter from the secretary of said company plaintiff.

And deponent further says: That there was kept at such agency a policy register, consisting of two books, volumes one and two, which specified the number, date, amount, and kind and duration of every policy issued by the plaintiff through deponent's agency, and showed the premium collectible each year from said policies, and whether such policies were for life or for a term of, and what term of,
73 years; and also showed the sub-agent through whom such policy was effected, and whether such policies had expired by forfeiture or time or death.

That such books, in or about the month of June, 1880, at the time the plaintiff sought to terminate such agency, were demanded by, and were by deponent delivered to, the plaintiff, and, as deponent believes, are now in the custody and possession and under the control of the plaintiff; that deponent has not any data from which he could make a bill of particulars in respect to such policies, as demanded by the plaintiff in subdivision 7 of both parts of the order to show *to show* cause aforesaid.

JOHN H. WALRATH.

Subscribed and sworn to before me, this 30th day of June, 1882.

A. G. MILLER,
Notary Public, Mil. Co., Wis.

(Endorsed:) Filed Sept. 4, '82. Julius Wechselberg, clerk.

Order Denying Plaintiff's Motion for Bill of Particulars.

Circuit Court, County of Milwaukee.

THE PHŒNIX MUTUAL INSURANCE CO.
vs.
JOHN H. WALRATH.

74 And now, at this day, the court being well and sufficiently advised of and concerning the motion of plaintiff to compel the defendant to deliver a bill of particulars, as specified in said motion, it is ordered that said motion be, and the same is hereby, overruled and denied, with ten dollars costs, with leave to the plaintiff to reply to the counter-claim in the defendant's answer within 15

days from service of this order, and upon payment of said ten dollars' costs.

Dated September 6, 1882.

By the court: CHARLES A. HAMILTON,
Circuit Judge.

(Endorsed:) Service admitted this 7th day of September, 1882. Finches, Lynde & Miller, pl'ff's att'ys. Filed Sep. 7, 1882. J. Wechselberg, clerk.

Exceptions of Plaintiff to Above Order.

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plaintiff,
against
JOHN H. WALRATH, Defendant.

And now comes the above-named plaintiff, by Finches, Lynde & Miller, its attorneys, and excepts to the order of the court made
75 and entered in the above-entitled matter on the 6th day of September, A. D. 1882, which said order denies the plaintiff's motion for a bill of particulars, and to each and every part of said order.

Milwaukee, Sept. 7th, 1882.

FINCHES, LYNDE & MILLER,
Pl'ff's Att'ys.

(Endorsed:) Filed Sep. 8, 1882. J. Wechselberg, clerk.

Petition for Removal to U. S. Court.

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plaintiff,
vs.
JOHN H. WALRATH, Defendant.

To the circuit court of Milwaukee county, Wisconsin:

The petition of the Phœnix Mutual Life Insurance Company of Hartford, Connecticut, the above-named plaintiff, respectively shows and alleges that at the date of the commencement of the above-entitled action, and long prior thereto, your petitioner was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and that the defendant was and is a citizen of the State of Wisconsin; that the above-entitled action is
76 now pending in the circuit court for Milwaukee county, Wisconsin; that the matter in dispute exceeds the sum of $500.00, exclusive of costs; and that the term of this court, commencing on the first Monday of October, A. D. 1882, is the first term of said court at which said cause could be tried; and that it is not yet at issue and has not as yet been brought to trial; and your

petitioner herewith presents a bond with William E. Thompson, a good and sufficient surety for its entering at the next term of the circuit court of the United States for the eastern district of Wisconsin, on the first day of its next session, a copy of the record in the above-entitled cause, copies of said process against defendant, and of all pleadings, depositions, testimony and other proceedings in the cause, and for the payment of all costs which may be awarded, if said circuit court shall hold this cause was wrongfully or improperly removed thereto, and also for the reappearing and entering special bail in said suit if special bail was originally requisite therein; and your petitioner hereby offers to furnish such additional security as this honorable court shall require.

77 Wherefore your petitioner prays this court to accept said petition and bond, and that the said above-entitled cause may be removed to the circuit court of the United States for the eastern district of Wisconsin, and that all proceedings in said Milwaukee county court may be stayed, and that said court proceed no further in the said action, and that your petitioner may have such other, further, and different relief as it may be entitled to pursuant to the provisions of the acts of Congress in that behalf; and your petitioner will ever pray, &c.

FINCHES, LYNDE & MILLER,
Attorneys for Petitioner "The Phœnix Mutual Life Insurance Company of Hartford, Connecticut."

Undertaking on Removal to U. S. Court.

Know all men by these presents, that we, The Phœnix Mutual Life Insurance Company of Hartford, Connecticut, as principal, and William E. Thompson, as surety, are held and firmly bound unto John H. Walrath, in the sum of five hundred dollars to be paid to the said John H. Walrath, his executors, administrators or assigns; to which payment well and truly to be made and done we

78 bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, the 13th day of September, A. D. 1882.

Whereas the above-bounden The Phœnix Mutual Life Insurance Company of Hartford, Connecticut, has petitioned the circuit court for Milwaukee county, State of Wisconsin, for the removal of a cause therein pending, wherein The Phœnix Mutual Life Insurance Company of Hartford, Connecticut, is plaintiff, and John H. Walrath is defendant, to the circuit court of the United States for the eastern district of Wisconsin, pursuant to the provisions of the acts of Congress in that behalf:

Now, therefore, the condition of the above obligation is such, that if the above-bounden The Phœnix Mutual Life Insurance Company of Hartford, Connecticut, shall enter in such circuit court, on the first day of its next session, a copy of the record in such suit, copies of the process against defendant, and of all the pleadings, depositions, testimony, and other proceedings in the cause, and shall pay

79 all costs that may be awarded by said circuit court, if said court shall hold that such suit was wrongfully or improperly

removed thereto, and shall also then and there appear and enter special bail in such suit, if special bail was originally requisite therein, then this obligation shall be null and void; otherwise, of force.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY, [SEAL.]
By J. M. HOLCOMBE, *Secretary.* [SEAL.]
WILLIAM E. THOMP-ON. [SEAL.]

In presence of—
HARRY CORNWELL.
GEO. R. MILLER.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

I, William E. Thompson, of Milwaukee, county of Milwaukee, and State of Wisconsin, the surety named in the foregoing bond, being duly sworn, do depose and say: That I am a resident of the State of Wisconsin and a property holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution.

WILLIAM E. THOMP-ON.

Subscribed and sworn to before me, this 13th day of September, A. D. 1882.

[SEAL.] GEORGE P. MILLER,
Notary Public, Milwaukee County, Wisconsin.

80 *Order of Removal to U. S. Court.*

THE STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plaintiff,
vs.
JOHN H. WALRATH, Defendant.

Upon filing the petition of the Phœnix Mutual Life Insurance Company of Hartford, Connecticut, for removal of above-entitled action to the circuit court of the United States for the eastern district of Wisconsin, and the bond thereto attached, showing that all the proceedings for the removal of said above-entitled action into the circuit court of the United States for the eastern district of Wisconsin, pursuant to the statute in such case made and provided, have been taken, and that said suit is one proper for such removal, and on motion of Finches, Lynde & Miller, attorneys for the petitioner—

It is hereby ordered, That said suit be, and the same hereby is, removed into the circuit court of the United States for the eastern district of Wisconsin, and the clerk of this court is hereby
81 directed to transmit and deliver to the clerk of the circuit court of the United States for the eastern district of Wiscon-

sin, copies of the record, and of the process against said petitioner, and of all pleadings, depositions, testimony, and other proceedings in the cause, and that the bond filed is hereby approved, and that all proceedings in this court are hereby stayed.

Dated, Milwaukee, September 14, A. D. 1882.

By the court: CHARLES A. HAMILTON,
Circuit Judge of Milwaukee County Circuit Court.

(Endorsed:) Filed Sept. 14, 1882. Julius Wechselberg, clerk.

Copy of Docket Entries.

Circuit Court, Milwaukee County. June Term, 1880.

THE PHOENIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *against* JOHN H. WALRATH. — 6570. Money Demand.

Finches, Linde & Miller.

JULY 19, 1880.

And now comes the plaintiff in the above-entitled action, by Finches, Lynde & Miller, its attorneys, and files its summons with certificate of service endorsed thereon as follows:

Milwaukee county, *ss:* I certify that at the city and county of
82 Milwaukee, on the 19th day of July, A. D. 1880, I served the within summons on the within-named def't John H. Walrath, personally, by delivering to and leaving with him a true copy thereof. Fees, $1.40. Peter Van Vechten, Jr., sheriff.

Same times comes the plaintiff by Finches, Lynde & Miller, and on the affidavit of George S. Miller moves the court for an order of arrest. Undertaken given and approved. E. H. Broadhead & H. H. Camp, sureties. Bail of defendant fixed at $12,000. Order of arrest granted. The undertaking of plaintiff fixed at $500.00, & bond & sureties approved.

July 19 & 21, 1880.—Affidavit, undertaking of pl'ff, & order of arrest filed. Undertaking on arrest filed.

Aug. 7, 1880.—Complaint filed.

Sept. 6, 1880.—Examination of John Walrath & order to show cause filed.

Sept. 13, 1880.—And now comes the plaintiff, by Finches, L. & M., its att'ys, & upon the order to show cause herein, moves the court to compel the defendant to answer the questions & each of them asked of him by the counsel for the plaintiff at the time
83 of the taking of said deposition & which he refused to answer.

The defendant, by Jenkins, Elliott & Winkler, appeared in opposition thereto, & counsel having been heard—

It is ordered that said motion be granted as far as relates to question No. 6 & denied as to the balance of the questions. Objected to, & that the papers be certified back to the master to proceed with the examination.

Sept. 17, 1880.—Further examination of John Walrath filed, & order filed.

Sept. 18, '80.—Notice of trial, &c., filed.

Nov. 15, 1880.—Hearing on order to show cause continued for one week.

Dec. 20, '80.—Hearing on motion continued to next motion day.

Dec. 30, 1880.—Notice of trial & note of issue filed.

Jan'y 3, 1881.—And now comes the plaintiff, by Finches, L. & M., its attorneys, and, upon the order filed herein on the 17 day of Sept., 1880, moves the court to compel the defendant to answer the questions and each of them asked of him by the counsel for the plaintiff at the time of the taking of the continuation of the deposition herein and which he refused to answer; the defendant appeared by Jenkins, Elliott & Winkler, his attorneys, in opposition thereto, and, counsel having been heard, the court takes the matter under advisement.

84

Jan'y 10, 1881.—And now at this time the court being well and sufficiently advised of and concerning the plaintiff's motion to compel the defendant to answer certain questions asked of him by the counsel for the plaintiff—

It is ordered that the defendant answer all questions in the examination of said defendant returned by the court commissioner, marked "Answer, D. W. S."

Jan. 11, 1881.—Order filed.

Jan. 15, 1881.—Exceptions to order of Jan. 11, 1881, filed.

Feb'y 23, 1881.—Answer filed. And now comes the plaintiff, by Finches, Lynde & Miller, its attorneys, and the defendant, by Jenkins, Elliott & Winkler, his attorneys, and this cause having been reached in its order on the calendar and the cause being at issue a jury is called who come, to wit, Charles Andrews, Leon Howard, A. Schwind, Chas. K. Sweetland, J. B. Neuer, Adolph Eimermann, A. E. Bloss, Thos. Murray, J. S. Mitchell, Wm. Langton, J. B. Pierce, & C. H. Stone, twelve good and lawful men of the county who, being duly tried, impaneled & sworn, the trial proceeded, and, not being concluded during the day, court adjourned to Feb. 24, 1881.

85

Feb'y 24, 1881.—Court opened, the jury in the box, and the trial proceeded; and, plaintiff having rested, the defendant moved the court for leave to amend his answer, which was opposed by plaintiff; and, respective counsel having been heard, said motion was denied.

Def't excepted, and the trial proceeded, and, the proofs having been examined, inspected, and submitted, the jury, by direction of the court, find for the plaintiff, and assess its damages at $9,172.22.

The defendant excepted to the direction of the court to the jury to find for the plaintiff.

A stay of proceedings was granted for 60 days. Affidavit of J. G. Jenkins filed. Defendant was allowed permission to file his amended answer, within a short time, as of to-day. Judge's charge filed. Amended answer filed.

Feb'y 28, 1881.—Motion for new trial filed.

May 2, 1881.—Stipulation filed and judgment filed, as follows:

This action being at issue, and having been tried on the issue of

fact, before the Honorable David W. Small, judge of this
86 court, and a jury, on the 23 & 24 days of February, A. D. 1881, and the verdict of the jury having been entered, whereby they find for the plaintiff, and assess its damages at the sum of nine thousand one hundred and seventy-two dollars and twenty-two cents, now, upon motion of Finches, Lynde & Miller, attorneys for the plaintiff, it is hereby adjudged that the Phœnix Mutual Life Insurance Company of Hartford, Connecticut, the plaintiff, recover of John H. Walrath, the defendant, the aforesaid sum of ninety-one hundred and seventy-two dollars and twenty-two cents, together with the sum of one hundred ninety-two dollars thirty-nine cents costs and disbursements, amounting in the whole to the sum of nine thousand three hundred sixty-four $\frac{61}{100}$.

JULIUS WECHSELBERG, *Clerk.*

Statement:

Damages	$9,172 22
Costs	192 39
	$9,364 61

Judgment docketed May 2, 1881, at 12.30 o'clock p. m.

June 29, 1881.—Undertaking on appeal. 4 notices of appeal filed, as follows:

GENTS: Please take notice that the defendant, John H.
87 Walrath, hereby appeals to the supreme court of the State of Wisconsin from the judgment rendered by the circuit court of the county of Milwaukee in the above-entitled action, in favor of the plaintiff above named, against the above-named defendant, John H. Walrath, for the sum of nine thousand three hundred and sixty-four dollars and sixty-one cents, and from the whole and every part of said judgment.

Dated Milwaukee, June 28, 1881.

Yours, &c., JENKINS, ELLIOTT & WINKLER,
Att'ys for Def't.

To Finches, Lynde & Miller, Esqrs., pl'ff's att'ys.

JULIUS WECHSELBERG, Esq., *Clerk.*

June 29, 1881.—Original records remitted to clerk of supreme court, at Madison, Wisconsin.

Sept. 10, 1881.—Bill of exceptions filed.

Sept. 10, 1881.—Bill of exceptions sent to supreme court, at Madison.

March 10, 1882.—Undertaking for defendant in $10,000.00, with R. H. Isham & J. D. Condit as sureties, filed.

April 11, 1882.—Original records received from clerk of supreme court and placed on file, together with *remittitur*, as follows:

This cause came on to be heard on appeal from the judgment of
the circuit court of Milwaukee county, and was argued by
88 counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the circuit

court of Milwaukee county in this cause be, and the same hereby is, reversed, and costs against the said respondent, taxed at the sum of one hundred and twenty-two and $\frac{35}{100}$ dollars; and that this cause be, and the same is hereby, remanded to the said circuit court, with directions to award a *venire facias de novo*. Same time certified copy [of] opinion by Taylor, J., filed.

April 21, '82.—Notice of trial & note of issue filed.

May 20, 1882.—Order to show cause filed.

And now comes the defendants, by Jenkins, Elliott & Winkler, his attorneys, and moves the court that the proposed amended answer herein, heretofore filed, stand as the amended answer herein; and, the plaintiff appearing by Finches, Lynde & Miller, its attorneys, and counsel having been heard—

Ordered, That the amended answer stand as the answer herein, the plaintiff to have 20 days from this date in which to reply, and this cause stand for trial at this term, without costs.

89 May 31, '82.—Motion for bill of particulars filed.

June 10, 1882.—Hearing on motion continued to next motion day.

June 24, 1882.—Hearing on motion continued to next motion day.

June 24, 1882.—Hearing on motion continued to next motion day.

July 3, 1882.—Hearing on motion continued to next motion day.

July 15, '82.—Hearing on motion continued to September next, and a stay of proceedings is granted.

Sept. 4, 1882.—Affidavit of John H. Walrath filed.

September 4, 1882.—And now comes the plaintiff, by Finches, Lynde & Miller, its attorneys, and on the order to show cause herein, moves the court that the defendant be required to furnish a bill of particulars, and the defendant appearing by Jenkins, Elliott & Winkler, and, counsel having been heard, the court takes the matter under advisement.

September 6th, 1882.—And now at this time, the court being well and sufficiently advised of and concerning the plaintiff's motion herein, that the defendant be required to furnish a

90 bill of particulars: It is ordered and adjudged by the court that said motion be and hereby is denied; and it is further ordered that the plaintiff have fifteen days to reply to the defendant's answer herein.

September 7th, 1882.—Order filed as follows: And now at this day, the court being well and sufficiently advised of and concerning the motion of plaintiff to compel the defendant to deliver a bill of particulars as specified in said motion: It is ordered that said motion be and the same is hereby overruled and denied, with ten dollars costs, with leave to the plaintiff to reply to the counterclaim in the defendant's answer within 15 days from service of the order, and upon payment of said ten dollars' costs.

Dated September 6, 1882.

By the court: CHARLES A. HAMILTON,
Circuit Judge.

September 8th, 1882.—Exceptions to order filed as follows: And now comes the above-named plaintiff, by Finches, Lynde & Miller, its attorneys, and excepts to the order of the court, made and entered in the above-entitled matter on the 6th day of September, A. D. 1882, which said order denies the plaintiff's motion for
91 a bill of particulars and to each and every part of said order.

Milwaukee, Sept. 7th, 1882.

FINCHES, LYNDE & MILLER,
Pl'ffs Att'ys.

September 14, 1882.—Petition, undertaking & order for removal of cause to circuit court of the United States, filed as follows:

Upon filing the petition of the Phœnix Mutual Life Insurance Company of Hartford, Connecticut, for removal of above-entitled action to the circuit court of the United States for the eastern district of Wisconsin, and the bond thereto attached, showing that all the proceedings for the removal of said above-entitled action into the circuit court of the United States for the eastern district of Wisconsin, pursuant to the statute in such case made and provided, have been taken, and that said suit is one proper for such removal, and on motion of Finches, Lynde & Miller, attorneys for the petitioner—

It is hereby ordered that said suit be, and the same hereby is, removed into the circuit court of the United States for the eastern district of Wisconsin, and the clerk of the court is hereby directed to transmit and deliver to the clerk of the circuit court of the
92 United Statec for the eastern district of Wisconsin copies of the record, and of the process against said petitioner, and of all pleadings, depositions, testimony, and other proceedings in the cause, and that the bond filed is hereby approved, and that all proceedings in this court are hereby stayed.

Dated Milwaukee, September 14, A. D. 1882.

By the court:

CHARLES A. HAMILTON,
Circuit Judge of Milwaukee County Circuit Court.

Certificate of Clerk to Return to U. S. Court.

THE STATE OF WISCONSIN, } ss:
Milwaukee County, }

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plaintiff,
against
JOHN H. WALRATH, Defendant.

I, Julius Wechselberg, clerk of the circuit court in and for the county of Milwaukee, and State of Wisconsin, do hereby certify that I have compared the foregoing copy with the original entries, and that the same is a true and correct transcript of the whole and every

part of all entries, orders and minutes in the books of the
93 clerk in the above-entitled action, and that the process, pleadings, and other papers hereunto annexed are the originals and all the papers filed in the above-entitled action, and that the same are herewith transmitted to the clerk of the circuit court of the United States for the eastern district of Wisconsin, pursuant to an order of said court on file herein.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at Milwaukee, the fifteenth day of September, A. D. 1882.

[SEAL.] JULIUS WECHSELBERG,
Clerk of the Circuit Court, Milwaukee County, Wisconsin,
By D. H. HENSHAW, *Deputy Clerk.*

Fees for change of venue, $1.

94 *Motion of Defendant to Remand Proceedings in U. S. Circuit Court.*

November 11, 1882.—This day, came the defendant by his counsel, Messrs. Jenkins, Elliott & Winkler, and moved the court to remand this cause to the circuit court for Milwaukee county, for reasons filed, as follows:

Circuit Court of the United States for the Eastern District of Wisconsin.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
vs.
JOHN WALRATH.

And now comes the said defendant by Jenkins, Elliott & Winkler, his attorneys, appearing herein especially, and for the purposes of this motion only, and moves the court now here to remand this cause to the circuit court of the county of Milwaukee, State of Wisconsin, from whence the same came, and that this court proceed no further therein upon the grounds:

First. That this court hath not acquired and has not jurisdiction of this cause.

Second. That the petition for removal of this cause from
95 the said circuit court of Milwaukee county to this court and filed in said circuit court of Milwaukee county, on the 14th day of September, 1882, discloses no grounds for the removal of said cause.

Third. That said petition was neither signed by the party plaintiff, nor verified by the plaintiff, nor by any one in its behalf.

Fourth. That said petition was not filed in this cause, in the said State court, before or at the term at which such cause could be first tried, nor before the trial thereof.

Fifth. That said cause had, prior to the filing of said petition, been in fact tried in said State court and judgment rendered therein.

This motion is founded upon all the papers, pleadings, proceed-

ings, and records of this cause now on file with the clerk of this court, and upon the affidavit of James G. Jenkins hereto annexed and filed herewith.

Dated November 10th, 1882.

JOHN H. WALRATH,
By JENKINS, ELLIOTT & WINKLER,
His Attorneys for this Motion.
JENKINS, ELLIOTT & WINKLER,
Atty's for Motion.

96 *Affidavit of Jas. G. Jenkins Accompanying Motion to Remand.*

EASTERN DISTRICT OF WISCONSIN, *ss:*

Circuit Court of the United States for the Eastern District of Wisconsin.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
vs.
JOHN H. WALRATH.

James G. Jenkins, being duly sworn, says: That he was one of the attorneys for the defendant in this cause while the same was pending in the State court, and had special charge of the conduct thereof on the part of the defendant. That said action was commenced on the 19th day of July, 1880, in the circuit court of Milwaukee county, Wisconsin; that an issue of fact was duly joined in said action on the 26th day of August, 1880, by service of an answer; that said cause was duly noticed for trial for the October term, 1880, of said circuit court, and placed upon the calendar of said court for trial at said term, which said term was the first term at which such cause could be first tried after joining of issue, but said cause was not tried at said term; that said cause
97 was duly noticed for trial for the January, 1881, term of said court, and was placed upon the calendar thereof for trial; and at said term, and on the 23rd and 24th days of February, 1881, said cause was tried before said court and a jury, and resulted in a verdict for the plaintiff, upon which judgment was duly entered and docketed, May 2nd, 1881; on June 29th, 1881, the defendant duly appealed from such judgment to the supreme court of the State of Wisconsin, and said cause was duly argued in said last-named court, and on October 18th, 1881, the said supreme court reversed said judgment and ordered a new trial in said action; that the records of said cause, with the proper remittitur from said supreme court, was filed in the circuit court of Milwaukee county April 11th, 1882, and said cause was thereafter duly noticed for trial for the May term, 1882, of said court, and was placed upon the calendar of said court for trial; on May 20th, 1882, the said circuit court permitted an amendment of defendant's answer, and
98 allowed the plaintiff twenty days to reply thereto, and that said cause stand for trial at said May term. On May 31st,

removed thereto, and shall also then and there appear and enter special bail in such suit, if special bail was originally requisite therein, then this obligation shall be null and void; otherwise, of force.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY, [SEAL.]
By J. M. HOLCOMBE, *Secretary.* [SEAL.]
WILLIAM E. THOMP-ON. [SEAL.]

In presence of—
HARRY CORNWELL.
GEO. R. MILLER.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

I, William E. Thompson, of Milwaukee, county of Milwaukee, and State of Wisconsin, the surety named in the foregoing bond, being duly sworn, do depose and say: That I am a resident of the State of Wisconsin and a property holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution.

WILLIAM E. THOMP-ON.

Subscribed and sworn to before me, this 13th day of September, A. D. 1882.

[SEAL.] GEORGE P. MILLER,
Notary Public, Milwaukee County, Wisconsin.

80 *Order of Removal to U. S. Court.*

THE STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plaintiff,
vs.
JOHN H. WALRATH, Defendant.

Upon filing the petition of the Phœnix Mutual Life Insurance Company of Hartford, Connecticut, for removal of above-entitled action to the circuit court of the United States for the eastern district of Wisconsin, and the bond thereto attached, showing that all the proceedings for the removal of said above-entitled action into the circuit court of the United States for the eastern district of Wisconsin, pursuant to the statute in such case made and provided, have been taken, and that said suit is one proper for such removal, and on motion of Finches, Lynde & Miller, attorneys for the petitioner—

It is hereby ordered, That said suit be, and the same hereby is, removed into the circuit court of the United States for the eastern district of Wisconsin, and the clerk of this court is hereby
81 directed to transmit and deliver to the clerk of the circuit court of the United States for the eastern district of Wiscon-

sin, copies of the record, and of the process against said petitioner, and of all pleadings, depositions, testimony, and other proceedings in the cause, and that the bond filed is hereby approved, and that all proceedings in this court are hereby stayed.

Dated, Milwaukee, September 14, A. D. 1882.

By the court: CHARLES A. HAMILTON,
Circuit Judge of Milwaukee County Circuit Court.

(Endorsed:) Filed Sept. 14, 1882. Julius Wechselberg, clerk.

Copy of Docket Entries.

Circuit Court, Milwaukee County. June Term, 1880.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
against
JOHN H. WALRATH.
} 6570. Money Demand.

Finches, Linde & Miller.

JULY 19, 1880.

And now comes the plaintiff in the above-entitled action, by Finches, Lynde & Miller, its attorneys, and files its summons with certificate of service endorsed thereon as follows:

Milwaukee county, *ss:* I certify that at the city and county of
82 Milwaukee, on the 19th day of July, A. D. 1880, I served the within summons on the within-named def't John H. Walrath, personally, by delivering to and leaving with him a true copy thereof. Fees, $1.40. Peter Van Vechten, Jr., sheriff.

Same times comes the plaintiff by Finches, Lynde & Miller, and on the affidavit of George S. Miller moves the court for an order of arrest. Undertaken given and approved. E. H. Broadhead & H. H. Camp, sureties. Bail of defendant fixed at $12,000. Order of arrest granted. The undertaking of plaintiff fixed at $500.00, & bond & sureties approved.

July 19 & 21, 1880.— Affidavit, undertaking of pl'ff, & order of arrest filed. Undertaking on arrest filed.

Aug. 7, 1880.—Complaint filed.

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Sept. 13, 1880.—And now comes the plaintiff, by Finches, L. & M., its att'ys, & upon the order to show cause herein, moves the court to compel the defendant to answer the questions & each of them asked of him by the counsel for the plaintiff at the time
83 of the taking of said deposition & which he refused to answer.

The defendant, by Jenkins, Elliott & Winkler, appeared in opposition thereto, & counsel having been heard—

It is ordered that said motion be granted as far as relates to question No. 6 & denied as to the balance of the questions. Objected to, & that the papers be certified back to the master to proceed with the examination.

Sept. 17, 1880.—Further examination of John Walrath filed, & order filed.

Sept. 18, '80.—Notice of trial, &c., filed.

Nov. 15, 1880.—Hearing on order to show cause continued for one week.

Dec. 20, '80.—Hearing on motion continued to next motion day.

Dec. 30, 1880.—Notice of trial & note of issue filed.

Jan'y 3, 1881.—And now comes the plaintiff, by Finches, L. & M., its attorneys, and, upon the order filed herein on the 17 day of Sept., 1880, moves the court to compel the defendant to answer the questions and each of them asked of him by the counsel for the plaintiff at the time of the taking of the continuation of the deposition herein and which he refused to answer; the defendant appeared by Jenkins, Elliott & Winkler, his attorneys, in opposition thereto, and, counsel having been heard, the court takes the matter under advisement.

84

Jan'y 10, 1881.—And now at this time the court being well and sufficiently advised of and concerning the plaintiff's motion to compel the defendant to answer certain questions asked of him by the counsel for the plaintiff—

It is ordered that the defendant answer all questions in the examination of said defendant returned by the court commissioner, marked "Answer, D. W. S."

Jan. 11, 1881.—Order filed.

Jan. 15, 1881.—Exceptions to order of Jan. 11, 1881, filed.

Feb'y 23, 1881.—Answer filed. And now comes the plaintiff, by Finches, Lynde & Miller, its attorneys, and the defendant, by Jenkins, Elliott & Winkler, his attorneys, and this cause having been reached in its order on the calendar and the cause being at issue a jury is called who come, to wit, Charles Andrews, Leon Howard, A. Schwind, Chas. K. Sweetland, J. B. Neuer, Adolph Eimermann, A. E. Bloss, Thos. Murray, J. S. Mitchell, Wm. Langton, J. B. Pierce, & C. H. Stone, twelve good and lawful men of the county who, being duly tried, impaneled & sworn, the trial proceeded, and, not being concluded during the day, court adjourned to Feb. 24, 1881.

85

Feb'y 24, 1881.—Court opened, the jury in the box, and the trial proceeded; and, plaintiff having rested, the defendant moved the court for leave to amend his answer, which was opposed by plaintiff; and, respective counsel having been heard, said motion was denied.

Def't excepted, and the trial proceeded, and, the proofs having been examined, inspected, and submitted, the jury, by direction of the court, find for the plaintiff, and assess its damages at $9,172.22.

The defendant excepted to the direction of the court to the jury to find for the plaintiff.

A stay of proceedings was granted for 60 days. Affidavit of J. G. Jenkins filed. Defendant was allowed permission to file his amended answer, within a short time, as of to-day. Judge's charge filed. Amended answer filed.

Feb'y 28, 1881.—Motion for new trial filed.

May 2, 1881.—Stipulation filed and judgment filed, as follows:

This action being at issue, and having been tried on the issue of

fact, before the Honorable David W. Small, judge of this
86 court, and a jury, on the 23 & 24 days of February, A. D. 1881, and the verdict of the jury having been entered, whereby they find for the plaintiff, and assess its damages at the sum of nine thousand one hundred and seventy-two dollars and twenty-two cents, now, upon motion of Finches, Lynde & Miller, attorneys for the plaintiff, it is hereby adjudged that the Phœnix Mutual Life Insurance Company of Hartford, Connecticut, the plaintiff, recover of John H. Walrath, the defendant, the aforesaid sum of ninety-one hundred and seventy-two dollars and twenty-two cents, together with the sum of one hundred ninety-two dollars thirty-nine cents costs and disbursements, amounting in the whole to the sum of nine thousand three hundred sixty-four $\frac{61}{100}$.

JULIUS WECHSELBERG, *Clerk.*

Statement:

Damages	$9,172 22
Costs	192 39
	$9,364 61

Judgment docketed May 2, 1881, at 12.30 o'clock p. m.

June 29, 1881.—Undertaking on appeal. 4 notices of appeal filed, as follows:

GENTS: Please take notice that the defendant, John H.
87 Walrath, hereby appeals to the supreme court of the State of Wisconsin from the judgment rendered by the circuit court of the county of Milwaukee in the above-entitled action, in favor of the plaintiff above named, against the above-named defendant, John H. Walrath, for the sum of nine thousand three hundred and sixty-four dollars and sixty-one cents, and from the whole and every part of said judgment.

Dated Milwaukee, June 28, 1881.

Yours, &c., JENKINS, ELLIOTT & WINKLER,
Att'ys for Def't.

To Finches, Lynde & Miller, Esqrs., pl'ff's att'ys.

JULIUS WECHSELBERG, Esq., *Clerk.*

June 29, 1881.—Original records remitted to clerk of supreme court, at Madison, Wisconsin.

Sept. 10, 1881.—Bill of exceptions filed.

Sept. 10, 1881.—Bill of exceptions sent to supreme court, at Madison.

March 10, 1882.—Undertaking for defendant in $10,000.00, with R. H. Isham & J. D. Condit as sureties, filed.

April 11, 1882.—Original records received from clerk of supreme court and placed on file, together with *remittitur*, as follows:

This cause came on to be heard on appeal from the judgment of the circuit court of Milwaukee county, and was argued by
88 counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the circuit

court of Milwaukee county in this cause be, and the same hereby is, reversed, and costs against the said respondent, taxed at the sum of one hundred and twenty-two and $\frac{35}{100}$ dollars; and that this cause be, and the same is hereby, remanded to the said circuit court, with directions to award a *venire facias de novo*. Same time certified copy [of] opinion by Taylor, J., filed.

April 21, '82.—Notice of trial & note of issue filed.

May 20, 1882.—Order to show cause filed.

And now comes the defendants, by Jenkins, Elliott & Winkler, his attorneys, and moves the court that the proposed amended answer herein, heretofore filed, stand as the amended answer herein; and, the plaintiff appearing by Finches, Lynde & Miller, its attorneys, and counsel having been heard—

Ordered, That the amended answer stand as the answer herein, the plaintiff to have 20 days from this date in which to reply, and this cause stand for trial at this term, without costs.

89 May 31, '82.—Motion for bill of particulars filed.

June 10, 1882.—Hearing on motion continued to next motion day.

June 24, 1882.—Hearing on motion continued to next motion day.

June 24, 1882.—Hearing on motion continued to next motion day.

July 3, 1882.—Hearing on motion continued to next motion day.

July 15, '82.—Hearing on motion continued to September next, and a stay of proceedings is granted.

Sept. 4, 1882.—Affidavit of John H. Walrath filed.

September 4, 1882.—And now comes the plaintiff, by Finches, Lynde & Miller, its attorneys, and on the order to show cause herein, moves the court that the defendant be required to furnish a bill of particulars, and the defendant appearing by Jenkins, Elliott & Winkler, and, counsel having been heard, the court takes the matter under advisement.

September 6th, 1882.—And now at this time, the court being well and sufficiently advised of and concerning the plaintiff's motion herein, that the defendant be required to furnish a

90 bill of particulars: It is ordered and adjudged by the court that said motion be and hereby is denied; and it is further ordered that the plaintiff have fifteen days to reply to the defendant's answer herein.

September 7th, 1882.—Order filed as follows: And now at this day, the court being well and sufficiently advised of and concerning the motion of plaintiff to compel the defendant to deliver a bill of particulars as specified in said motion: It is ordered that said motion be and the same is hereby overruled and denied, with ten dollars costs, with leave to the plaintiff to reply to the counterclaim in the defendant's answer within 15 days from service of the order, and upon payment of said ten dollars' costs.

Dated September 6, 1882.

By the court: CHARLES A. HAMILTON,
Circuit Judge.

September 8th, 1882.—Exceptions to order filed as follows: And now comes the above-named plaintiff, by Finches, Lynde & Miller, its attorneys, and excepts to the order of the court, made and entered in the above-entitled matter on the 6th day of September, A. D. 1882, which said order denies the plaintiff's motion for
91 a bill of particulars and to each and every part of said order.

Milwaukee, Sept. 7th, 1882.

FINCHES, LYNDE & MILLER,
Pl'ffs Att'ys.

September 14, 1882.—Petition, undertaking & order for removal of cause to circuit court of the United States, filed as follows:

Upon filing the petition of the Phœnix Mutual Life Insurance Company of Hartford, Connecticut, for removal of above-entitled action to the circuit court of the United States for the eastern district of Wisconsin, and the bond thereto attached, showing that all the proceedings for the removal of said above-entitled action into the circuit court of the United States for the eastern district of Wisconsin, pursuant to the statute in such case made and provided, have been taken, and that said suit is one proper for such removal, and on motion of Finches, Lynde & Miller, attorneys for the petitioner—

It is hereby ordered that said suit be, and the same hereby is, removed into the circuit court of the United States for the eastern district of Wisconsin, and the clerk of the court is hereby directed to transmit and deliver to the clerk of the circuit court of the
92 United Statec for the eastern district of Wisconsin copies of the record, and of the process against said petitioner, and of all pleadings, depositions, testimony, and other proceedings in the cause, and that the bond filed is hereby approved, and that all proceedings in this court are hereby stayed.

Dated Milwaukee, September 14, A. D. 1882.

By the court:

CHARLES A. HAMILTON,
Circuit Judge of Milwaukee County Circuit Court.

Certificate of Clerk to Return to U. S. Court.

THE STATE OF WISCONSIN, }
Milwaukee County, } *ss:*

Circuit Court, Milwaukee County.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plaintiff,
against
JOHN H. WALRATH, Defendant.

I, Julius Wechselberg, clerk of the circuit court in and for the county of Milwaukee, and State of Wisconsin, do hereby certify that I have compared the foregoing copy with the original entries, and that the same is a true and correct transcript of the whole and every

part of all entries, orders and minutes in the books of the
93 clerk in the above-entitled action, and that the process, pleadings, and other papers hereunto annexed are the originals and all the papers filed in the above-entitled action, and that the same are herewith transmitted to the clerk of the circuit court of the United States for the eastern district of Wisconsin, pursuant to an order of said court on file herein.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at Milwaukee, the fifteenth day of September, A. D. 1882.

[SEAL.] JULIUS WECHSELBERG,
Clerk of the Circuit Court, Milwaukee County, Wisconsin,
By D. H. HENSHAW, *Deputy Clerk.*

Fees for change of venue, $1.

94 *Motion of Defendant to Remand Proceedings in U. S. Circuit Court.*

November 11, 1882.—This day, came the defendant by his counsel, Messrs. Jenkins, Elliott & Winkler, and moved the court to remand this cause to the circuit court for Milwaukee county, for reasons filed, as follows:

Circuit Court of the United States for the Eastern District of Wisconsin.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
vs.
JOHN WALRATH.

And now comes the said defendant by Jenkins, Elliott & Winkler, his attorneys, appearing herein especially, and for the purposes of this motion only, and moves the court now here to remand this cause to the circuit court of the county of Milwaukee, State of Wisconsin, from whence the same came, and that this court proceed no further therein upon the grounds:

First. That this court hath not acquired and has not jurisdiction of this cause.

Second. That the petition for removal of this cause from
95 the said circuit court of Milwaukee county to this court and filed in said circuit court of Milwaukee county, on the 14th day of September, 1882, discloses no grounds for the removal of said cause.

Third. That said petition was neither signed by the party plaintiff, nor verified by the plaintiff, nor by any one in its behalf.

Fourth. That said petition was not filed in this cause, in the said State court, before or at the term at which such cause could be first tried, nor before the trial thereof.

Fifth. That said cause had, prior to the filing of said petition, been in fact tried in said State court and judgment rendered therein.

This motion is founded upon all the papers, pleadings, proceed-

ings, and records of this cause now on file with the clerk of this court, and upon the affidavit of James G. Jenkins hereto annexed and filed herewith.

Dated November 10th, 1882.

JOHN H. WALRATH,
By JENKINS, ELLIOTT & WINKLER,
His Attorneys for this Motion.
JENKINS, ELLIOTT & WINKLER,
Atty's for Motion.

96 *Affidavit of Jas. G. Jenkins Accompanying Motion to Remand.*

EASTERN DISTRICT OF WISCONSIN, *ss:*

Circuit Court of the United States for the Eastern District of Wisconsin.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
vs.
JOHN H. WALRATH.

James G. Jenkins, being duly sworn, says: That he was one of the attorneys for the defendant in this cause while the same was pending in the State court, and had special charge of the conduct thereof on the part of the defendant. That said action was commenced on the 19th day of July, 1880, in the circuit court of Milwaukee county, Wisconsin; that an issue of fact was duly joined in said action on the 26th day of August, 1880, by service of an answer; that said cause was duly noticed for trial for the October term, 1880, of said circuit court, and placed upon the calendar of said court for trial at said term, which said term was the first term at which such cause could be first tried after joining of issue, but said cause was not tried at said term; that said cause
97 was duly noticed for trial for the January, 1881, term of said court, and was placed upon the calendar thereof for trial; and at said term, and on the 23rd and 24th days of February, 1881, said cause was tried before said court and a jury, and resulted in a verdict for the plaintiff, upon which judgment was duly entered and docketed, May 2nd, 1881; on June 29th, 1881, the defendant duly appealed from such judgment to the supreme court of the State of Wisconsin, and said cause was duly argued in said last-named court, and on October 18th, 1881, the said supreme court reversed said judgment and ordered a new trial in said action; that the records of said cause, with the proper remittitur from said supreme court, was filed in the circuit court of Milwaukee county April 11th, 1882, and said cause was thereafter duly noticed for trial for the May term, 1882, of said court, and was placed upon the calendar of said court for trial; on May 20th, 1882, the said circuit court permitted an amendment of defendant's answer, and
98 allowed the plaintiff twenty days to reply thereto, and that said cause stand for trial at said May term. On May 31st,

the plaintiff served an order requiring the defendant to show cause at a time and place therein stated, why a bill of particulars of the defendant's demand should not be served, and staying the proceedings of the defendant until the hearing and decision of said motion; said motion was heard, and on the 6th day of September, 1882, denied by the court.

And deponent says that since the issue of fact was joined herein in August, 1880, and prior to the filing of a petition for removal of this cause to the United States court, the following terms of said circuit court were duly appointed by the laws of Wisconsin to be held with a jury, and said terms were actually so held, namely, commencing first Monday in October, 1880, second Monday in January, first Monday in May, first Monday in October, 1881, second Monday in January, and first Monday in May, 1882, and further says not.

JAS. G. JENKINS.

99 Sworn to before me, this 10th day of November, 1882.

[SEAL.] CHAS. E. WILD,
Notary Public, Mil. Co., Wis.

December 28, 1882.—This day came the defendant, by his counsel, and on his motion, and by consent, it is ordered by the court that the motion to remand this cause be, and hereby is, continued to the sixth day of January next.

And now at this same term, to wit, January term, A. D. 1883, and on the sixth day thereof, to wit, on the sixth day of January, A. D. 1883, the following proceedings were had, to wit:

Hearing of Motion to Remand.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
vs.
JOHN H. WALRATH. } At Law.

This day came the parties by their counsel, and the motion of the defendant to remand this cause to the circuit court for Milwaukee county came on to be heard, and was argued by Mr. Jenkins on behalf of said defendant, and by Messrs. H. M. Einch and Geo.
100 P. Miller in opposition, and, being submitted, the court took the same under consideration.

And afterwards, to wit, on the fourteenth day of the term, to wit, on the seventeenth day of January, A. D. 1883, the following proceedings were had, to wit:

Order Remanding Case to State Court.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
vs.
JOHN H. WALRATH. } At Law.

This day came the parties, by their counsel, and on consideration

of the motion of the defendant to remand this cause, and of the arguments of counsel thereon, it is ordered by the court that this cause be, and hereby is, remanded to the circuit court for Milwaukee county, in this State, and that the plaintiff pay the costs of this court to be taxed.

January 23, 1883.—This day came the plaintiff, by its attorneys, and filed its bond in the sum of thirty thousand dollars, with
101 Aaron C. Goodman and Jonathan B. Bunce as sureties, conditioned that said plaintiff shall prosecute a writ of error to effect and answer all damages and costs, if it fail to make its plea good, which bond is approved by the district judge, and is as follows:

Supersedeas Bond.

Know all men by these presents that we, Phœnix Mutual Life Insurance Company of Hartford, as principal, and Aaron C. Goodman and Jonathan B. Bunce, both of Hartford, Conn., as sureties, are held and firmly bound unto John H. Walrath in the full and just sum of thirty thousand dollars, to be paid to the said John H. Walrath, or to his certain attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twentieth day of January, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas, lately at a circuit court of the United States for the eastern district of Wisconsin in a suit pending in said court,
102 between The Phœnix Mutual Life Insurance Company of Hartford, Connecticut, plaintiff, against John H. Walrath, defendant, a final judgment was rendered against the said plaintiff, The Phœnix Mutual Life Insurance Company of Hartford, Connecticut, and the said, The Phœnix Mutual Life Insurance Company of Hartford, Connecticut, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the final judgment in the aforesaid suit, and a citation directed to the said John H. Walrath, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Phœnix Mutual Life Insurance Company of Hartford, Connecticut, shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else, to remain in full force and virtue.

PHŒNIX MUTUAL LIFE INSURANCE CO.,
By A. C. GOODMAN, *President.* [SEAL.]
103 AARON C. GOODMAN. [SEAL.]
JONATHAN B. BUNCE. [SEAL.]

Sealed and delivered in presence of—
N. SHIPMAN.
J. F. DONOHUE.

Approved by— N. SHIPMAN,
U. S. District Judge for District of Connecticut.

STATE OF CONNECTICUT, *Hartford County:*

CITY OF HARTFORD, *January 20th*, 1883.

I, Aaron C. Goodman, being duly cautioned and sworn, do depose and say that I am worth, over and above my debts, the sum of thirty thousand dollars.

A. C. GOODMAN.

Sworn to before me, January 20th, 1883.

N. SHIPMAN,
U. S. District Judge.

STATE OF CONNECTICUT, *Hartford County:*

CITY OF HARTFORD, *January 20th*, 1883.

I, Jonathan B. Bunce, being duly cautioned and sworn, do depose and say that I am worth, over and above my debts, the sum of thirty thousand dollars.

JON. B. BUNCE.

Sworn to before me, January 20th, 1883.

N. SHIPMAN,
U. S. District Judge.

104 (Endorsed:) Approved. Chas. E. Dyer, judge. Jan. 23, 1883.

Order Superseding Execution.

Whereupon it is ordered by the court that execution of this judgment be superseded, and a writ of error and citation issued and a copy of said writ of error lodged for the defendant in error.

January 31, 1883.—Assignment of errors filed, as follows:

Assignment of Errors.

United States Circuit Court, Eastern District of Wisconsin.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plaintiff in Error,

vs.

JOHN H. WALRATH, Defendant in Error.

At the January term of the circuit court of the United States in and for the eastern district of Wisconsin, in the year one thousand eight hundred and eighty-three, to wit, on the 17th day of January, 1883, in the said term, before the Hon. Charles E. Dyer, judge of the circuit court of the United States, in the city of Milwaukee,
105 comes the said The Phœnix Mutual Life Insurance Company, by Finches, Lynde & Miller, its attorneys, and says:

That in giving judgment aforesaid there is manifest error in this, to wit, that the judgment aforesaid was given for the defendant John H. Walrath when, by the law of the land, no judgment at all ought to have been given, but the court ought to have made an order that

this cause was legally removed and have retained jurisdiction thereof; and the court ought not to have decided that it had no jurisdiction of this cause because removed too late, but, on the contrary, ought to have decided that it had jurisdiction because removed in time, and ought not to have ordered this cause remanded to the State court from whence it came, but, on the contrary, ought to have retained the jurisdiction of this cause.

And the said The Phœnix Mutual Life Insurance Company of Hartford, Connecticut, prays that the said judgment aforesaid, for the errors aforesaid, may be reversed, annulled, and altogether
106 held for nothing, and that it may be restored to all things which it has lost by reason of said judgment, &c.

FINCHES, LYNDE & MILLER,
Attorneys for Plaintiff in E. ror.

107 *Opinion of Court.*

U. S. Circuit Court, East'n Dist. of Wis.

THE PHŒNIX MUTUAL LIFE INS. CO. *vs.* JOHN H. WALRATH.

Finches, Lynde & Miller, for plaintiff, Jenkins, Elliott & Winkler for defendant.

DYER, *J.:*

A motion is made to remand this case to the State court from which it was removed to this court. The action was commenced in July, 1880, in the circuit court for Milwaukee county. Issue was joined therein by the service of an answer on the 26th day of August, 1880. The cause was duly noticed for trial for the October term of the State court of that year, and was placed on the calendar of that court for trial at that term, which was the first time at which it could be tried after issue was joined therein. It was, however, not tried at that term but was tried at the January term, 1881, before the court and a jury, the trial resulting in a verdict for the plaintiff upon which judgment was duly entered.

108 The original answer was a general denial, and on the trial the defendant asked leave to amend his answer but the court refused leave and excluded testimony which it is understood would have been competent not only under the proposed amended answer but under the original answer. These rulings were excepted to and an appeal was taken by the defendant to the supreme court of the State. That court reversed the judgment of the court below and remanded the case for a new trial. The case was thereafter duly noticed for trial for the May term, 1882, of the Milwaukee county circuit court and was placed on the calendar for trial. Subsequently, and on the 20th day of May, 1882, the defendant applied for permission to file an amended answer. The court permitted such answer to be filed, and, as the same contained allegations constituting a counter-claim, the plaintiff was allowed twenty days to reply thereto, and the cause, by order of the court, stood for trial at said May term. On the 31st day of May the plaintiff served on the de-

fendant an order requiring him to show cause why a bill of
109 particulars of the defendant's demand should not be served and staying proceedings on the part of the defendant until the hearing and decision of said motion. The motion was heard and denied on the 6th day of September, 1882, which was after the expiration of the May term of the court. The plaintiff was then allowed fifteen days to reply to the defendant's counter-claim. Before the time thus granted in which to file a reply expired and on the 14th day of September, 1882, the plaintiff procured the cause to be removed to this court under the removal act of 1875.

The first term of the State court at which the case could be tried after the decision of the motion for a bill of particulars, and after the plaintiff was allowed fifteen days to reply to the defendant's counter-claim, was the October term, 1882. This being the record in the State court, the defendant moves to remand the cause to that court, on the ground that at the time of the removal of the same to this court, it was not removable under the act of 1875.

110 Much of the argument of counsel on both sides proceeded on the theory that the case was removable after its return from the supreme court of the State to the court below; and in that view there was extended discussion of this question, namely: What was the first term of the State circuit court after the reversal of its judgment by the supreme court when the case, in the then state of the record, could be first tried?

But the vital question to be here considered lies back of that, and is this: Was the case removable to this court under the act of 1875, after the trial thereof in January, 1881?

Before the passage of the act of 1875 there had been considerable controversy in the courts as to the time with reference to a trial in the State court when a cause could be removed. In Insurance Co. *v.* Dunn, 19 Wall., 214, the court, construing the act of 1867, held that under that act a case could be removed after a trial on the merits if the statute of the State, as in Ohio, where the case arose, gave to the defeated party the right to a second trial; in other
111 words, that under that act a case could be removed at any time before final trial.

In the Revised Statutes (sub. 3, sec. 639) the words of the act of 1867 were changed from "final hearing or trial" to "trial or final hearing" as in the act of 1866; and then followed the act of 1875, which was clearly intended to abridge the time within which suits could be removed from the State to the Federal court. Hendecker *v.* Rosenbaum, 6 Fed. Rep., 98-99.

Section 3 of the act of March 3, 1875, provides "that whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a State court to the circuit court of the United States, he or they may make and file a petition in such suit in such State court before or at the term at which said cause could be first tried and before the trial thereof for the removal of such suit into the circuit court," etc.

Then by section 2 it was provided "that any suit of a civil nature,

at law or in equity, now pending or hereafter brought in any State court, where the matter in dispute exceeds," etc., may be
112 removed into the circuit court of the United States, thus making the act apply to suits pending at the time of the passage of the act.

The clear meaning of these two sections when considered together is that where a case was pending in the State court at the time of the passage of the act, it could be removed to the Federal court if the application for removal was thereafter reasonably made, and if it was otherwise removable, notwithstanding there might have been a trial in the State court before the passage of the act. But as to any and all cases brought in the State court subsequent to the passage of the act there could be no removal after a trial in that court; because the words of the statute are that the application for removal must be made before or at the term at which the cause could be first tried, and before the trial thereof. The language of the act means in regard to suits pending when the act was passed, the first trial after the right of removal attached subsequently to the passage of the act. Hoadly *v.* San Fran-
113 cisco, 3 Sawyer, 553-555. Hendecker *v.* Rosenbaum, *supra.* And obviously its language, in regard to suits thereafter brought, means the term after such suits are begun, when a trial could first be had. See also Bible Society *v.* Grove, 101 U. S., 610.

The case of Hewitt *v.* Phelps, 105 U. S., 393, much relied on by the carned counsel opposing this motion, it will be noticed, was one that was pending in the State court when the removal act of 1875 was passed. It was commenced in 1869, and dismised on final hearing in 1874. An appeal was taken to the supreme court of Mississippi, the decree of dismissal was reversed, and the case came back to the court below for further proceedings in conformity with the opinion of the appellate court, and thereafter the case was removed to the Federal court. It was therefore a case coming within the second section of the act, as a case then pending, with a right of removal existing at the time it was removed, which was before the first term at which it could be first heard or tried after the passage of the act;
114 and therefore came directly within the ruling made in the removal cases, 100 U. S., 457.

The case at bar was not pending when the act of 1875 was passed. As we have seen, it was commenced in 1880. There was a trial at the January term, 1881, of the State court. That trial was followed by an appeal and a reversal of the judgment of the court below, and the case came back for a new trial. Then for the first time there was an application for removal. That application came too late, because in such a case, the statutory requirement is imperative that the removal must be made before there is any trial of the suit in the State court.

As the suit was not brought in the State court until after the act of 1875 was passed, it cannot help the party here petitioning for a removal that the judgment which followed the first trial was reversed, and that the case came back to the circuit court of the State for a new trial. It was not removable after the October term,

1880, of the State court, and the motion to remand must be granted.

115 UNITED STATES OF AMERICA, *Eastern District of Wisconsin*, } *ss:*

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals, and correct transcripts therefrom, being a complete transcript of the record and proceedings in the case of The Phœnix Mutual Life Ins. Co. *vs.* John H. Walrath under the stipulation of the parties filed.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said district, this twelfth day of February, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States, the 107th.

[Seal U. S. Circuit Court, Eastern District, Wisconsin.]

EDWARD KURTZ, *Clerk.*

116 UNITED STATES OF AMERICA, *ss:*

[Seal U. S. Circuit Court, Eastern District, Wisconsin.]

The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America, for the eastern district of Wisconsin, before you, between The Phœnix Mutual Life Insurance Company of Hartford, Connecticut, plaintiff, and John H. Walrath, defendant, a manifest error hath happened, to the great damage of the said The Phœnix Mutual Life Insurance Company of Hartford, Connecticut, as by the complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from this date, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, that of right and according to law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 23rd day of January, in the year of our Lord one thousand eight hundred and eighty-three,

and of the Independence of the United States the one hundred and seventh.

EDWARD KURTZ,
Clerk U. S. Circuit Court for the East'n Dis't of Wisconsin.

[Endorsed:] Filed January 23, 1883. Edw. Kurtz, clerk.

117 THE UNITED STATES OF AMERICA, *ss:*

To John H. Wallrath, Greeting:

[SEAL.] You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days after this date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein The Phœnix Mutual Life Insurance Company of Hartford, Connecticut, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, in the said district, this 23rd day of January, A. D. 1883, and of the Independence of the United States the 107th.

CHAS. E. DYER, *Judge.*

We accept service of the above citation, this 9th day of February, A. D. 1883.

JENKINS, WINKLER & SMITH,
Atty's for J. H. Wallrath.

Endorsed on cover: E. Wisconsin. C. C. U. S. No. 196. The Phœnix Mutual Life Insurance Company of Hartford, Connecticut, plaintiff in error, *vs.* John H. Walrath. Filed 26th February, 1883.

117-865

Office Supreme Court U. S.
FILED
MAR 4 1886
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 196.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

JOHN H. WALRATH, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

FINCHES, LYNDE & MILLER,
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

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STATEMENT OF CASE.

The above cause is ar action at law commenced in the Circuit Court for Milwaukee county, Wisconsin, on the 19th day of July, 1880, by the service of a summons (folio 3).

The complaint (folios 4, 5 and 6) alleges that the defendant John H. Walrath was the agent of the plaintiff to collect, receive and transmit premiums of insurance on policies of life insurance; that he collected and received for said plaintiff, premiums to the amount of $10,000, which he has wrongfully taken and converted to his own use, although by the plaintiff demanded previous to the commencement of the action.

The answer of the defendant was a general denial (folio 8) and was served on the plaintiff August 26, 1880.

The cause was noticed for trial for the October term of the Court, 1880 (folios 7 and 8), and the January term, 1881 (folios 6 and 7), and the cause was tried (folios 84 and 85) before a jury of twelve men on February 23 and 24, 1881, which trial resulted in a verdict for the plaintiff, upon which verdict a judgment was duly entered (folios 85 and 86).

On June 29, 1881 (folios 86 and 87), the defendant appealed to the Supreme Court of the State of Wisconsin, and on April 11, 1882, the remittitur (folios 87 and 88) from said Supreme Court was received by the Circuit Court for Milwaukee county, which remittitur reversed the said judgment against the plaintiff, and directed the said Circuit Court to award a *venire facias de novo.*

The cause was noticed for trial for the May term, 1882 (folio 60), and the defendant, after the cause was on the calendar of said term for trial, to-wit, on May 13, 1882, procured an order to show cause (folios 60 and 61) why the defendant should not be permitted to amend his answer, and on May 20, 1882, an order (folio 88) was entered allowing the answer to be amended, and giving the plaintiff twenty days to reply to the counterclaim contained in said answer. Before the expiration of said twenty days, to-wit, on May 31, 1882, the plaintiff secured an order to show cause (folios 67 and 68) why its motion for a bill of particulars of the defendant's defense and counterclaim should not be granted, and until the hearing and determination of the said motion all proceedings were stayed. The hearing on said motion was continued from day to day (folio 89) until September 4, 1882, when the motion was heard. September 6, 1882 (folio 90), the Court denied the plaintiff's motion, and granted it fifteen days to reply to the defendant's counterclaim.

On September 14, 1882 (folios 75 to 81), the plaintiff filed its removal papers in the State Court, and secured an order of removal to United States Circuit Court for the Eastern District of Wisconsin.

On the first day of the next term of said United States Court for the Eastern District of Wisconsin (folio 2) a certified copy of the record from the State Court was filed, and the cause docketed in the said Federal Court.

The defendant moved to remand the case, and on January 14, 1883, the said Federal Court (folio 100) granted the defendant's motion and remanded the case to the State Court. (Opinion of Judge Dyer, see folios 107 to 114.) To reverse this order the plaintiff has prosecuted this writ of error.

ASSIGNMENT OF ERROR.

The only assignment of error which can be made is, that the cause was properly removed to the Federal Court and that the order remanding the same was erroneous.

ARGUMENT.

The only question involved in this case is, whether the cause was removed to the Federal Court "*before or at the term at which such cause could be first tried and before the trial thereof,*" as provided by the act of March 3, 1875 (Sec. 3). If this cause was removed in time, then the order of the United States Circuit Court for the Eastern District of Wisconsin remanding the same to the State Court was erroneous.

It appears that the plaintiff brought its suit for a conversion by the defendant of $10,000, and the only answer was a general denial. Upon the issue as thus joined a trial was had and resulted in a verdict for and judgment in favor of the plaintiff. The Supreme Court of Wisconsin reversed this judgment and granted a new trial, because evidence was improperly excluded and because the lower Court refused to permit the defendant to amend his answer upon the trial and plead a counterclaim.

Phœnix Mutual Life Insurance Company *vs.* Walrath, 53 Wis., 669.

Upon the cause being returned to the lower Court it was noticed for trial, and then the defendant applied to the Court for leave to amend his answer and plead a counterclaim, which application was granted.

The answer contains certain matter pleaded as a defense and thereafter a counterclaim. This counterclaim (folios 16 to 22) sets up a cause of action for breach of contract of agency, and the defendant prays judgment against the plaintiff for $15,000 damages. Before the plaintiff had replied to this counterclaim it removed the cause to the Federal Court.

Although it is somewhat anomalous in our system of law that a defendant should be allowed to plead a counterclaim sounding in contract, when the plaintiff has brought his suit to recover damages for the wrongful conversion of property, yet in Wisconsin such a counterclaim is proper.

Revised Statutes of Wisconsin of 1878, Section 2656.
Insurance Co. *vs.* Walrath, 53 Wis., 669.

Under this last decision the Court may permit a defendant, *even upon the trial,* to amend an answer containing a general denial and plead a counterclaim.

A counterclaim in Wisconsin is more than what is commonly understood by "off-set" and "recoupment." It is an independent separate suit brought by the defendant against the plaintiff. It is the commencement of a new, distinct and different suit from that which is pending. It requires separate pleadings from the original suit. It is so separate and distinct that if the plaintiff discontinue the original suit, that does not affect the defendant's suit against the plaintiff, does not discontinue the counterclaim.

Bertschy *vs.* McLeod, 32 Wis., 205.
Bertschy *vs.* McLeod, 33 Wis., 176.
McLeod *vs.* Bertschy, 34 Wis., 244.

We admit that if the answer had not been amended the case could not have been removed because the original suit had already been tried, and several terms of Court had elapsed, but when the Court allowed the defendant *to bring a new suit by way of counterclaim,* is the plaintiff to be deprived of its right to remove this new suit by anything that has occurred previous to its commencement?

We claim the right to remove the new suit, and have removed it before the term at which it could be first tried, and even before issue was joined. The new suit was certainly removable.

If the new suit, i. e. the counterclaim was properly removed, of course, the Court should not have remanded the case.

The question here involved is important; it involves the question of the effect of amendments on the right to remove a case. In all the code states amendments to pleadings are allowed almost as a matter of course. So liberal have the courts became in allowing such amendments that the Court can allow an answer containing a general denial to be amended upon the trial, by pleading a counterclaim. Could a plaintiff deliberately prevent a removal of a case by praying judgment for less than $500, and as soon as a term of Court had elapsed, increase his prayer by amendment to $50,000? It might be that a litigant would be willing to try a suit in the State Court which involved less than $500, but not a suit involving $50,000. In the case at bar, the insurance company was willing to try its conversion suit in the State Court, but not an action at law for damages, brought by the defendant against it. If the defendant had pleaded his counterclaim in the first instance, the plaintiff could have exercised its right to remove the case to the Federal Court, but by delaying to plead the counterclaim until a term of court had elapsed, has the defendant prevented such removal? If it has, a skillful use (abuse) of pleadings and amendments can prevent almost any case being removed. This we do not believe to be the spirit, intent or meaning of the Removal Act.

We believe the law to be, that if a party commences a new suit by way of counterclaim, either party can remove that new suit to the Federal Court if removed before or at the term at which such new suit could be first tried, and before the trial thereof.

We respectfully submit that the judgment of the Court below should be reversed for the error assigned.

GEORGE P. MILLER,
Of Counsel for Plaintiff in Error.

FINCHES, LYNDE & MILLER,
Attorneys for Plaintiff in Error.

February 11, 1886.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

ARGUMENT FOR DEFENDANT IN ERROR.

This cause comes to this Court upon writ of error to review the decision of the Circuit Court, remanding the cause to the State Court, whence it came. The cause was removed under the Act of March 3d, 1875. The sole question for review is whether the proceedings for removal were timely.

The action was brought in the Circuit Court for Milwaukee County, Wisconsin, July 19th, 1880, and an issue, triable by jury, was joined therein August 26th, 1880. The terms of that Court since 1878 have been begun and held annually "on the first Monday in January, the first Monday in May, the fourth Monday in June and the first Monday in October," all jury terms, excepting the June term. (R. S. Wis., 1878, Sec. 2424.) The case was duly placed upon the calendar of the Court for trial at the October term, 1880. It was not tried at that term, and was again duly placed upon the calendar for trial at the January term,

1881, and was then tried. At the trial the defendant asked leave to file an amended answer, setting up specially facts which the Court had refused to receive in evidence under the general issue. (Record, pages 21–24.) The motion was denied and the trial proceeded, resulting in a verdict and judgment for the plaintiff. Upon appeal by the defendant to the Supreme Court of the State, the judgment was reversed and the cause remanded for a new trial, the Court deciding that evidence of the facts specially pleaded in the proposed amendment should have been received under the plea of the general issue, and that the trial Court erred in refusing the amended pleading. (53 *Wis.*, 669.)

The record was remitted to the lower Court, April 11th, 1882, and the case was next duly placed upon the calendar for trial at the May term, 1882. On May 20th, in said May term, the defendant applied for leave to file the amended answer previously refused, and such leave was granted, the plaintiff allowed twenty days to reply, and the cause ordered by the Court to stand for trial at that term. On May 31st, in said May term, the plaintiff applied for an order requiring the defendant to furnish a bill of particulars of his demand, and procured a stay of proceedings pending the motion. This motion was heard and denied September 6th, 1882, after the expiration of said May term, and the plaintiff then allowed fifteen days further time to reply. On September 14th, 1882, and of the June term, 1882, the plaintiff filed his petition for removal.

The first term at which the cause could be tried was the October term, 1880. It is respectfully submitted that the cause was not removable after the expiration of that term.

For the purposes of this case, Sections 2 and 3 of the Removal Act of March 3d, 1875, may be read, as follows :

> "Any suit * * * *now pending or hereafter brought* * * * may be removed * * * *before or at the term at which such cause could be first tried and before the trial thereof.*"

In *Hewitt vs. Phelps* (105 U. S., 395), referring to this statute, it was said :

> "In contemplation of the act above mentioned, there are and can be but two classes of suits : one, those pending at the time of its passage ; the other, those thereafter brought."

This Court has had occasion to construe this statute both with respect to causes pending at the time of its passage, and causes thereafter brought, and has held that causes pending at the time of its passage must be removed before or at the first term at which they could be tried *after its passage* (*Removal Cases*, 100 U. S., 457–473), and that cases brought after its passage must be removed before or at the first term at which they could be tried *after they were brought.*

Bible Society vs. Grove, 101 U. S., 610.
Holland vs. Chambers, 110 U. S., 59.

It is clear that the rule applicable to cases pending at the time of the passage of the act has no application to a case brought after its passage, since the expression, "before the trial thereof," would be meaningless.

At the argument below, the case of *Hewitt vs. Phelps*, *supra*, was relied upon by counsel for the plaintiff in error. That case was pending at the time of the passage of the act, and the petition was filed before the first term thereafter at which it could be tried. The case, therefore, is not in point.

The cause was not removable after the October term, 1880, unless the interposition of the amended answer on May 20th, 1882, introduced a new and separate controversy, and so revived the right of removal lost by the passage of the October term, 1880.

The pleadings were complete upon the joining of an issue of fact on the 26th day of August, 1880. The cause then stood for trial on its merits, and was triable at the October term, 1880. No petition for removal was filed at that term. The subsequent amendment of the answer, by leave of court, *even if it created a new issue*, did not revive the right of removal lost by the passage of the October term, 1880.

Edrington vs. Jefferson, 111 U. S., 770.
Pullman Palace Car Co. vs. Speck, 113 U. S., 84.
Babbitt vs. Clark, 103 U. S., 606.
Gregory vs. Hartley, 113 U. S., 742.
Murray vs. Holden, 1 McCrary, 341.
Cramer vs. Mack, 20 Blatch., 479.

The pleading of the facts as a counterclaim did not affect or extend the time for the exercise of the right of removal.

The law of Wisconsin provides that a counterclaim must be by way of answer to the plaintiff's cause of action.

"Section 2655. The answer of the defendant must contain:

"1. A general or specific denial of each material allegation of the complaint, controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

"2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition."

A counterclaim is a right of action existing in favor of the defendant and against the plaintiff, and arising out of one of the following causes of action:

"1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

"2. In an action arising on contract, any other cause of action arising also on contract, express or implied, and existing at the commencement of the action.

"3. Where the plaintiff is a non-resident of the State, any cause of action whatever arising within the State and existing at the commencement of the action, except that no claim assigned to the defendant shall be pleaded by virtue alone of this subdivision."—R. S. Wisconsin, Section 2656.

The counterclaim pleaded fell within both the first and third subdivisions of the section referred to.

The facts stated were pleaded in the amended answer both as an affirmative defense and as a counterclaim. They could so have been pleaded in the original answer. The defendant elected, however, to plead the general issue under which the same facts pleaded in the amended answer were provable in evidence to defeat the plaintiff's claim. The amendment, therefore, did not present any new or independent controversy, and it was merely formal, and not of substance, offering no new issue.

It was determined by the supreme court of Wisconsin in this cause, and is *res adjudicata* between the parties, that the facts stated in the amended pleading—whether by way of defense or counterclaim, were properly provable under the general issue. (53 Wis., 669). Therefore

no new issue was tendered by the amendment. Its office was merely to spread upon the record in the form of an affirmative defense and also as a counterclaim facts which it was competent for the defendant to prove under the issue previously joined. The effect of pleading them as a counterclaim was not to enable the defendant to prove what he would otherwise be barred from proving, but only to enable the defendant to recover against the plaintiff the excess of his damages above the amount of the plaintiff's demand.

Upon principle, therefore, the case is within the rule established by the decisions of this court, and the cause was properly remanded to the state court, whence it was untimely removed.

We beg to refer the court to the able opinion of the District Judge (Record, pages 52-54), upon the motion to remand, as conclusive upon the question presented.

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Of counsel for Defendant in error.

JENKINS, WINKLER, FISH & SMITH,
Attorneys.